

2014 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT*

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit is unique among the thirteen United States Circuit Courts of Appeals. An Article III federal appellate court, the Federal Circuit was created in 1982 by a merger of the U.S. Court of Customs and Patent Appeals and the appellate division of the U.S. Court of Claims.¹ As a result of this merger, the Federal Circuit retained the jurisdiction formerly vested

1. See generally *Court Jurisdiction*, U.S. CT. APPEALS FOR FED. CIR., <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited Apr. 1, 2015).

in those courts² and also gained exclusive, nationwide jurisdiction to hear appeals of final and interlocutory decisions arising out of specific types of cases.³ The Federal Circuit may hear matters concerning, *inter alia*, interlocutory and final decisions involving “international trade, government contracts, patents, certain money claims against the United States government, federal personnel, veterans’ benefits, and public safety officers’ benefits claims.”⁴

With respect to international trade cases, the Federal Circuit has exclusive jurisdiction for appeals of the interlocutory⁵ and final decisions⁶ of the U.S. Court of International Trade (the “Trade Court”), which has exclusive jurisdiction to hear civil actions involving import transactions and international trade,⁷ including those arising under the Tariff Act of 1930.⁸ The Federal Circuit also has exclusive jurisdiction over appeals of the interlocutory⁹ and final determinations¹⁰ of the U.S. International Trade Commission (USITC or the “Commission”), which, under and pursuant to the Tariff Act, investigates import injury matters (e.g., antidumping and countervailing duties)¹¹ and other matters pertaining to unfair import trade practices.¹²

2. John R. Magnus & Sheridan S. McKinney, *2012 International Trade Law Decisions of the Federal Circuit*, 62 AM. U. L. REV. 963, 964 (2013).

3. *Court Jurisdiction*, *supra* note 1; see 28 U.S.C. § 1295(a) (2012) (enumerating the scope of the Federal Circuit’s appellate jurisdiction, which includes jurisdiction over appeals from the U.S. Court of International Trade (the “Trade Court”) and final decisions of the U.S. International Trade Commission (USITC or “the Commission”).

4. *Court Jurisdiction*, *supra* note 1; see 28 U.S.C. §§ 1291, 1292(c)–(d), 1295 (delineating the scope of the Federal Circuit’s jurisdiction).

5. 28 U.S.C. § 1292(c)(1).

6. *Id.* § 1295(a)(5).

7. *About the Court*, U.S. CT. INT’L TRADE, <http://www.cit.uscourts.gov/AboutTheCourt.html> (last visited Apr. 1, 2015); see 28 U.S.C. §§ 1581–1585 (setting forth the Trade Court’s jurisdiction).

8. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).

9. 28 U.S.C. § 1292(c)(1).

10. *Id.* § 1295(a)(6).

11. 19 U.S.C. §§ 1336(a), 1671a(b), 1673a(b); see *Import Injury*, U.S. INT’L TRADE COMMISSION, http://www.usitc.gov/trade_remedy.htm (last visited Apr. 1, 2015) (providing an overview of the USITC and Department of Commerce’s roles in antidumping (“AD”) and countervailing duty (“CVD”) investigations).

12. 19 U.S.C. § 1337(a)–(b); see *Intellectual Property Infringement and Other Unfair Acts*, U.S. INT’L TRADE COMMISSION, http://www.usitc.gov/intellectual_property.htm (last visited Apr. 1, 2015) (discussing the USITC’s authority to conduct intellectual property infringement investigations concerning imported goods).

In 2014, the Federal Circuit issued thirty-six precedential opinions in the international trade-related cases it heard on appeal from the Trade Court and USITC.¹³ Of those cases, the Federal Circuit affirmed twenty-seven cases, reversed or vacated seven cases, and issued two orders it considered of precedential value.¹⁴

Fifteen of the Federal Circuit's opinions primarily involved customs duties and tariff assessment questions under the Tariff Act, with twelve of the tariff assessment cases specifically addressing the classification of imported goods under and pursuant to the Harmonized Tariff Schedule of the United States (the "HTSUS" or "HTS").¹⁵ One of the tariff assessment cases, *Deckers Corp. v. United States*,¹⁶ is of special note because it provided the Federal Circuit with a rare opportunity to discuss the Federal Circuit's unique stare decisis jurisprudence in the context of an HTSUS tariff classification case.¹⁷ Of the remaining three customs duties cases, one addressed the fraudulent understatement of dutiable value,¹⁸ one addressed the assessment of customs duties in general,¹⁹ and one involved liquidation of the assessed customs duty.²⁰

13. Please see the Appendix to this Article for a complete listing, in table format, of the precedential international trade opinions issued by the Federal Circuit in 2014. The table provides the names and citations of the opinions, identifies the type of case and the relevant U.S. agency, and provides the Federal Circuit's disposition of the case.

14. See *infra* Parts II.C, III.C., IV.B (reviewing selected customs duty and tariff assessment cases, anti-dumping and countervailing duty cases, and section 337 cases). In this Article, those opinions involving the same or similar issues

15. See *infra* Part II.C (describing the customs duty and tariff assessment cases that the Federal Circuit reviewed in 2014). The Harmonized Tariff Schedule of the United States (the "HTSUS" or "HTS") is located at 19 U.S.C. § 1202. The HTSUS is no longer published in the U.S. Code but is maintained by the USITC. See *About Harmonized Tariff Schedule*, U.S. INT'L TRADE COMMISSION, http://www.usitc.gov/tariff_affairs/about_hts.htm (last visited Apr. 1, 2015) (providing an overview of the HTSUS). See generally *infra* note 85 (explaining the HTSUS standard of review).

16. 752 F.3d 949 (Fed. Cir. 2014).

17. *Id.* at 954–66 (noting that in tariff classification cases, the panels are bound by prior decisions unless relieved by an en banc order or a U.S. Supreme Court decision).

18. *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1291, 1300 (Fed. Cir. 2014) (affirming the Court of International Trade's conclusion that an import company president understated dutiable value of imported men's suits), *petition for cert. docketed sub. nom* Shadadpuri v. United States (U.S. Feb. 13, 2015) (No. 14-986).

19. *United States v. C.H. Robinson Co.*, 760 F.3d 1376, 1383 (Fed. Cir. 2014) (holding a bonded carrier was liable for duties, taxes, and fees for missing imported merchandise).

20. *Chemsol, LLC v. United States*, 755 F.3d 1345, 1356 (Fed. Cir. 2014) (affirming the Court of International Trade's decision that it did not have

In addition, seventeen Federal Circuit cases addressed antidumping duty and countervailing duty orders and related matters under the Tariff Act,²¹ one of which is of special note—*Guangdong Wireking Housewares & Hardware Co. v. United States*.²² In *Guangdong Wireking*, the Federal Circuit addressed an Ex Post Facto Clause challenge to a Tariff Act amendment that increased the scope and amount of antidumping duty/countervailing duty (AD/CVD) rates to be imposed upon certain items imported from the People’s Republic of China.²³ *Guangdong Wireking* is discussed in Part III.

In addition to *Guangdong Wireking*, the Federal Circuit reviewed six other AD/CVD cases challenging the methods used by the U.S. Department of Commerce (Commerce) to calculate AD/CVD rates.²⁴ Another four cases addressed challenges to Commerce’s use²⁵ of adverse inferences against importers (or their governments) for failing to cooperate with AD/CVD investigations.²⁶ Three cases involved calculation of AD rates to be imposed in light of administrative reviews of existing AD orders.²⁷ Of the remaining three cases, one case addressed an importer’s challenge to the scope of an existing AD/CVD order,²⁸ one case considered a

jurisdiction to review a challenge of the liquidation of entries where the administrative process was adequate to remedy the claims).

21. See *infra* Part III.C (describing the AD and CVD order cases that the Federal Circuit reviewed in 2014). The “AD” provisions of the Tariff Act are found at 19 U.S.C. §§ 1673–1673h (2012), and the “CVD” provisions are found at 19 U.S.C. §§ 1671–1671h.

22. 745 F.3d 1194 (Fed. Cir. 2014).

23. *Id.* at 1196.

24. *Thai Plastic Bags Indus. Co. v. United States*, 774 F.3d 1366 (Fed. Cir. 2014); *Home Meridian Int’l, Inc. v. United States*, 772 F.3d 1289 (Fed. Cir. 2014); *Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281 (Fed. Cir. 2014); *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378 (Fed. Cir. 2014); *MacLean-Fogg Co. v. United States*, 753 F.3d 1237 (Fed. Cir. 2014); *Marvin Furniture (Shanghai) Co. v. United States*, 744 F.3d 1319 (Fed. Cir. 2014).

25. Under the Tariff Act, both the USITC and the Department of Commerce (Commerce) play a role in determining whether antidumping duties and/or countervailing duties should be assessed. See 19 U.S.C. § 1671–1671h (countervailing duties); § 1673–1673h (antidumping duties).

26. *Mukand, Ltd. v. United States*, 767 F.3d 1300 (Fed. Cir. 2014); *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396 (Fed. Cir. 2014); *Essar Steel, Ltd. v. United States*, 753 F.3d 1368 (Fed. Cir. 2014); *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365 (Fed. Cir. 2014).

27. *Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371 (Fed. Cir. 2014); *Mueller Comercial de Mex., S. de R.L. de C.V. v. U.S.*, 753 F.3d 1227 (Fed. Cir. 2014); *Thai Plastic Bags Indus. Co. v. United States*, 746 F.3d 1358 (Fed. Cir. 2014).

28. *Fedmet Res. Corp. v. United States*, 755 F.3d 912 (Fed. Cir. 2014).

challenge to the instructions issued by Commerce with respect to an existing AD/CVD order,²⁹ and one case involved challenges to USITC's and Commerce's determinations that certain imports would not harm the relevant industry.³⁰

Finally, the Federal Circuit issued four precedential decisions in cases involving international patent infringement cases reviewed by the USITC, or "section 337" cases.³¹ Of these, two addressed enforcement of consent orders preventing the import of infringing products,³² one addressed whether an imported product violated a U.S. inventor's patent,³³ and one considered whether, in an infringement case, a writ of mandamus should issue to compel the USITC to review a party's non-infringement argument.³⁴

This Article proceeds in four Parts. Part I describes the Trade Court's jurisdiction and briefly discusses the two main categories of international trade-related cases heard by it: (1) customs duties and tariff assessments under the Tariff Act and (2) AD/CVD orders, investigations, and other matters under the Tariff Act. Part II discusses the customs matters appealed to the Federal Circuit from the Trade Court, and includes a description of the relevant statutory basis and procedural history permitting the Trade Court and Federal Circuit to exercise jurisdiction in those matters. Similarly, Part III addresses the AD/CVD matters heard by the Trade Court and appealed to the Federal Circuit, together with the relevant statutory and procedural bases supporting the exercise of jurisdiction by the Trade Court and Federal Circuit in those cases. Part IV addresses the section 337 cases heard by the Federal Circuit, including the relevant statutory basis and procedural history of those cases.

29. *Michaels Stores, Inc. v. United States*, 766 F.3d 1388 (Fed. Cir. 2014).

30. *Wind Tower Trade Coal. v. United States*, 741 F.3d 89 (Fed. Cir. 2014).

31. *See infra* Part IV.B (reviewing the four precedential decisions). *See generally* 19 U.S.C. § 1337 (establishing the requirements for "section 337" cases, or international parent infringement cases involving unfair practices in import trade).

32. *UPI Semiconductor Corp. v. Int'l Trade Comm'n*, 767 F.3d 1372 (Fed. Cir. 2014); *Align Tech., Inc. v. Int'l Trade Comm'n*, 771 F.3d 1317 (Fed. Cir. 2014).

33. *X2Y Attenuators, LLC v. Int'l Trade Comm'n*, 757 F.3d 1358 (Fed. Cir. 2014).

34. *In re Nokia Inc.*, 760 F.3d 1348 (Fed. Cir. 2014) (*per curiam*).

I. INTRODUCTION TO THE U.S. COURT OF INTERNATIONAL TRADE
AND THE U.S. INTERNATIONAL TRADE COMMISSION

A. *The U.S. Court of International Trade*

The U.S. Court of International Trade is an Article III court created by the Customs Control Act of 1980 (Customs Courts Act).³⁵ The result of a comprehensive overhaul of the federal judiciary with respect to international trade-related litigation, the Customs Courts Act clarified and expanded the jurisdiction of the U.S. Customs Court and reconstituted it as the U.S. Court of International Trade (the “Trade Court”).³⁶ Headquartered in New York City, the Trade Court hears cases that arise throughout the United States and has the authority to hold hearings in foreign countries.³⁷

As set forth in the Customs Courts Act, the Trade Court has exclusive jurisdiction over international trade-related civil actions,³⁸ including certain matters brought by the United States³⁹—together with any related counterclaims, cross-claims, or third-party claims—that arise under or concern the application of the Tariff Act with respect to merchandise imported into the United States.⁴⁰ The Trade Court hears two main categories of cases under the Tariff Act: customs matters and AD/CVD matters.⁴¹

Generally, the customs matters the Trade Court hears involve challenges concerning the customs duties U.S. Customs and Border Protection (“CBP”) assesses against merchandise entering into the United States under the Tariff Act.⁴² These challenges primarily include (1) judicial review of protests brought by importers against CBP concerning the amounts of customs duties imposed on

35. Pub. No. L. 96-417, 94 Stat. 1727 (codified as amended in scattered sections of 28 U.S.C.).

36. *Id.* § 102, 94 Stat. 1727. The U.S. Customs Court became an Article III court in 1956; prior to that, it was an Article I court that replaced the Board of General Appraisers, a quasi-judicial agency formed in 1890 within the U.S. Department of the Treasury. *About the Court*, *supra* note 7.

37. *About the Court*, *supra* note 7.

38. 28 U.S.C. § 1581.

39. *See id.* § 1582 (pertaining to actions generally brought by the United States); *id.* § 1584 (concerning actions brought by the United States under the North American Free Trade Agreement or the United States-Canada Free Trade Agreement).

40. *Id.* § 1583.

41. *Id.* § 1581(a)–(c) (providing that the Trade Court has “exclusive jurisdiction” over customs and AD/CVD matters).

42. *See, generally*, 19 U.S.C. §§ 1514 - 1516A.

merchandise imported into the United States,⁴³ and (2) petitions by interested parties in the United States⁴⁴ regarding customs duties CBP imposed on imported merchandise.⁴⁵ Similarly, the AD/CVD cases the Trade Court hears primarily involve actions for judicial review of the AD- and CVD-related proceedings of the USITC and Commerce,⁴⁶ including (1) investigations regarding allegations of AD/CVD activities,⁴⁷ (2) determinations to impose AD/CVD duties following the investigations (including decisions to terminate an investigation),⁴⁸ and (3) the amounts to be imposed under any AD/CVD orders.⁴⁹

The Trade Court also has exclusive jurisdiction to hear any other action against the United States pertaining to the administration, imposition, and enforcement of the Tariff Act.⁵⁰ However, the Federal Circuit “has repeatedly held that [28 U.S.C. § 1581(i)] ‘may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the other remedy provided under that other subsection would be manifestly inadequate.’”⁵¹

43. *See id.* § 1581(a) (stating that the Trade Court has “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,” which is now codified at 19 U.S.C. § 1515). Such protests are permitted by 19 U.S.C. § 1514. The amount and rate of customs duties on goods imported into the United States by U.S. Customs and Border Protection (CBP) appear in the HTSUS. 19 U.S.C. § 1202.

44. *See generally* 19 U.S.C. § 1516 (outlining the petition process).

45. *See* 28 U.S.C. § 1581(b) (stating that the Trade Court has “exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930,” which is now codified at 19 U.S.C. § 1516).

46. *See id.* § 1581(c) (stating that the Trade Court has “exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930,” which is now codified at 19 U.S.C. § 1516a).

47. *See* 19 U.S.C. § 1671a (initiating a CVD investigation); *id.* § 1673a (initiating an AD investigation).

48. *See id.* §§ 1671b–1671d (regarding CVD investigations); *id.* §§ 1673b–1673d (regarding AD investigations).

49. *See id.* § 1671e (CVD); *id.* § 1673e (AD).

50. 28 U.S.C. § 1581(i). This is the so-called “residual jurisdiction” provision referenced in *Chemsol, LLC v. United States*, 755 F.3d 1345, 1348–49 (Fed. Cir. 2014) (calling the “residual jurisdiction” provision a “catch all provision” because it grants the Trade Court broad jurisdiction to implement and enforce the Tariff Act (internal quotation marks omitted)).

51. *Chemsol, LLC*, 755 F.3d at 1349 (quoting *Ford Motor Co. v. United States*, 688 F.3d 1319, 1323 (Fed. Cir. 2012)).

B. The U.S. International Trade Commission

Initially created as the U.S. Tariff Commission under the Tariff Act of 1930,⁵² the U.S. International Trade Commission (the “Commission” or “USITC”) “is an independent, quasi-judicial Federal agency with broad investigative responsibilities on matters of trade.”⁵³ As set forth in the Tariff Act of 1930, the Commission is charged with the duty

to investigate the administration and fiscal and industrial effects of the customs laws of this country, the relations between the rates of duty on raw materials and finished or partly finished products, the effects of ad valorem and specific duties and of compound specific and ad valorem duties, all questions relative to the arrangement of schedules and classification of articles in the several schedules of the customs law, and, in general, to investigate the operation of customs laws, including their relation to the Federal revenues, their effect upon the industries and labor of the country, and to submit reports of its investigations as hereafter provided.⁵⁴

As noted above, the Commission investigates both import injury matters (e.g., AD- and CVD-related matters)⁵⁵ and other matters pertaining to unfair import trade practices, such as the importation of items and merchandise that infringe upon any patent, trademark, mask work, or copyright registered under the laws of the United States.⁵⁶ The intellectual property infringement investigations are known as section 337 investigations and are conducted in accordance with the Tariff Act of 1930 and the Administrative Procedure Act (APA).⁵⁷ As noted on the Commission’s website,

52. Pub. L. No. 71-361, § 330, 46 Stat. 590, 696 (codified as amended at 19 U.S.C. § 1330).

53. *About the USITC*, U.S. INT’L TRADE COMMISSION, http://www.usitc.gov/press_room/about_usitc.htm (last visited Apr. 1, 2015).

54. 19 U.S.C. § 1332(a).

55. *Id.* §§ 1336(a), 1671a(b), 1673a(b) (setting forth the petition and investigation procedures); *Import Injury*, *supra* note 11. The Commission’s authority to investigate AD-related matters arises under 19 U.S.C. § 1336(a), which provides, in pertinent part, that the USITC shall “investigate the differences in the costs of production of any domestic article and of any like or similar foreign article.” 19 U.S.C. § 1336(a). Further, 19 U.S.C. § 1337(a)(1)(A) grants the Commission authority to investigate CVD-related matters. *Id.* § 1337(a)(1)(A).

56. 19 U.S.C. § 1337(a)(1)(B)–(E). However, these provisions only apply “if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” *Id.* § 1337(a)(2).

57. *Intellectual Property Infringement and Other Unfair Acts*, *supra* note 12.

Section 337 investigations conducted by the . . . Commission most often involve claims regarding intellectual property rights, including allegations of patent infringement and trademark infringement by imported goods. Both utility and design patents, as well as registered and common law trademarks, may be asserted in these investigations. Other forms of unfair competition involving imported products, such as infringement of registered copyrights, mask works or boat hull designs, misappropriation of trade secrets or trade dress, passing off, and false advertising, may also be asserted The primary remedy available in Section 337 investigations is an exclusion order that directs Customs to stop infringing imports from entering the United States. In addition, the Commission may issue cease and desist orders against named importers and other persons engaged in unfair acts that violate Section 337. Expedited relief in the form of temporary exclusion orders and temporary cease and desist orders may also be available in certain exceptional circumstances.⁵⁸

II. FEDERAL CIRCUIT REVIEW OF CUSTOMS DUTY AND TARIFF ASSESSMENT

A. *Customs Duties and Tariff Assessments Under the Tariff Act*

Under the Tariff Act, any merchandise arriving in the United States by any vessel must be formally entered into the United States⁵⁹ so that the merchandise may be examined, inspected, and appraised.⁶⁰ This process allows CBP to establish or estimate the value of the merchandise,⁶¹ to classify the merchandise⁶² and determine the duty rate to be assessed,⁶³ and, ultimately, to determine the amount of any duties, taxes, fines, or other fees to be assessed against the merchandise.⁶⁴ During this process, the merchandise should remain in CBP's custody unless it is released pursuant to a bond or other form of security.⁶⁵ Once CBP has completed the examination, classification, and appraisal process, CBP

58. *Id.*

59. *See generally* 19 U.S.C. § 1484 (establishing requirements for entry of merchandise into the United States, which involves providing documentation to CBP so CBP may determine whether it can release the merchandise from its custody).

60. *Id.* § 1499(a).

61. *Id.* § 1500(a).

62. CBP classifies merchandise according to the HTSUS, which uses a "hierarchical structure" to describe goods in trade and to set duty rates for those goods. *See About Harmonized Tariff Schedule, supra* note 15.

63. 19 U.S.C. § 1500(b).

64. *Id.* § 1500(a)-(c).

65. *Id.* § 1499(a).

will “liquidate the entry.”⁶⁶ The liquidation calculation normally includes the amounts to be paid under any AD or CVD orders, if any.⁶⁷

In 1989, Congress enacted legislation creating the HTSUS, which replaced the former Tariff Schedules of the United States.⁶⁸ As the USITC has noted,

[t]he HTS comprises a hierarchical structure for describing all goods in trade for duty, quota, and statistical purposes. This structure is based upon the international Harmonized Commodity Description and Coding System (HS), administered by the World Customs Organization in Brussels; the 4- and 6-digit HS product categories are subdivided into 8-digit unique U.S. rate lines and 10-digit non-legal statistical reporting categories. Classification of goods in this system must be done in accordance with the General and Additional U.S. Rules of Interpretation, starting at the 4-digit heading level to find the most specific provision and then moving to the subordinate categories. . . . The USITC maintains and publishes the HTS (in print and on-line) pursuant to the Omnibus Trade and Competitiveness Act of 1988; see the preface to the HTS for additional explanatory material. However, the Bureau of Customs and Border Protection of the Department of Homeland Security is responsible for interpreting and enforcing the HTS.⁶⁹

B. *Judicial Review of Customs Duties and Tariff Assessments*

Under the Tariff Act, all determinations made by CBP with respect to customs duties to be imposed on merchandise imported into the United States—including the value of the merchandise, the classification and duty rate to be assessed, the total amount of the duties to be paid, or any errors or omissions with respect to any of the above⁷⁰—are final and binding on all parties unless a party files a protest with CBP or a civil action in the Trade Court.⁷¹ In addition, interested parties located in the United States may file a petition with

66. *Id.* § 1500(d). The term “liquidation” means “the final computation or ascertainment of duties on entries for consumption or drawback entries.” 19 C.F.R. § 159.1 (2014). All entries of imported merchandise are to be liquidated. *Id.* § 159.2.

67. *See, e.g.*, *U.S. Tsubaki, Inc. v. United States*, 512 F.3d 1332, 1333–34 (Fed. Cir. 2008) (AD orders); *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998) (CVD orders).

68. *About Harmonized Tariff Schedule*, *supra* note 15.

69. *Id.*

70. 19 U.S.C. § 1514(a)(1)–(7).

71. *Id.* § 1514. Any such protest must be filed with CBP “within 180 days after but not before . . . [the] date of liquidation or reliquidation, or . . . the date of the decision as to which protest is made.” *Id.* § 1514(c)(3).

CBP to challenge the description of the merchandise, the classification and duty rate to be assessed, and the total amount of the duty to be paid with respect to the entry of the merchandise.⁷²

As previously mentioned, the Trade Court has exclusive jurisdiction to hear challenges to the amount and rates of customs duties CBP levies on merchandise that has been imported into the United States.⁷³ Hence, subject to the limitations imposed by the Tariff Act, any party aggrieved by a decision of the CBP with respect to a petition or protest challenging the customs duties to be assessed against merchandise imported into the United States may file a civil action in the Trade Court.⁷⁴ In turn, the Federal Circuit has exclusive jurisdiction to review appeals of interlocutory⁷⁵ and final decisions of the Trade Court, including the Trade Court's review of customs duties petitions and protests.⁷⁶

C. Customs Duty and Tariff Assessment Cases Reviewed by Federal Circuit in 2014

In 2014, the Federal Circuit reviewed fifteen customs duties and tariff assessment cases on appeal from the Trade Court. Of those cases, twelve addressed, in one way or another, the classification of merchandise under the HTSUS and, therefore, the applicable duty rate to be used in calculating the duties to be assessed with respect to the entry of those items. Eleven of these cases, including *Deckers* (which discussed the Federal Circuit's unique stare decisis jurisprudence), addressed specific issues that may arise respecting the process for determining under what HTSUS heading an item should be classified. The twelfth case addressed notice and due process issues associated with a change in HTSUS classification that occurred when CBP changed its interpretation of HTSUS headings without following the relevant rulemaking and notice requirements.⁷⁷

72. *Id.* § 1516.

73. 28 U.S.C. § 1581(a) (stating that the Trade Court has exclusive jurisdiction to review customs duties protests brought against CBP under 19 U.S.C. § 1515).

74. *Id.* § 1581(a)-(b). 28 U.S.C. § 2636 sets forth competing limitations. For example, it provides that actions to review a protest under 19 U.S.C. § 1515(a) must be filed in Trade Court within 180 days after the notice of denial was *mailed* but that actions under 19 U.S.C. § 1515(b) must be filed within 180 days *after a protest denied by operation of law*. See 28 U.S.C. § 2636(a).

75. 28 U.S.C. § 1292(c)(1).

76. *Id.* § 1295(a)(5).

77. *Int'l Custom Prods., Inc. v. United States*, 748 F.3d 1182, 1187-88 (Fed. Cir. 2014) (holding that CBP must follow the notice and comment procedures set forth in 19 U.S.C. § 1625(c) when it reclassifies certain imports).

Of the remaining three cases, one addressed the imposition of fines and penalties for items that went “missing” under a Transportation and Exportation (“T&E”) bond⁷⁸ and another addressed the fines and penalties imposed on an importer for fraudulently understating or misrepresenting the dutiable value of the items imported.⁷⁹ The third case addressed CBP’s extension of the statutory liquidation period for entries of certain items as well as the subject matter jurisdiction of the Trade Court under the residual jurisdiction provision.⁸⁰ However, because the Federal Circuit specifically addressed the process of classifying merchandise under the HTSUS in eleven of the thirty-six international trade-related precedential decisions issued by it in 2014, this Part of the Article solely focuses on those cases.⁸¹

In its 2014 HTSUS-related decisions, the Federal Circuit took great pains to explain and to reinforce the proper analytic framework to be used in classifying items under the HTSUS. Of these decisions, the opinions that best set forth the proper analytical framework for classifying items under the HTSUS are *Roche Vitamins, Inc. v. United States*⁸² and *Dependable Packaging Solutions, Inc. v. United States*.⁸³ The remaining HTSUS classification cases—including *Deckers*, the stare decisis case—each addressed a specific issue with respect to the overall HTSUS classification analysis scheme.

In *Roche Vitamins, Inc.* and *Dependable Packaging Solutions, Inc.*, the Federal Circuit provided a detailed outline of the specific process for classifying items and applying a specific tariff provision under the

78. *United States v. C.H. Robinson Co.*, 760 F.3d 1376 (Fed. Cir. 2014). As the court explained, “[a] bonded carrier transporting merchandise pursuant to a T & E entry must comply with certain regulations governing the receipt, safekeeping, and disposition of bonded merchandise . . . [and] is responsible for any ‘shortage, irregular delivery, or nondelivery at the port of destination or exportation of bonded merchandise received by it’” *Id.* at 1380 (quoting 19 C.F.R. § 18.8(a) (2014)). A bonded carrier could also be liable for additional penalties related to bonded merchandise that becomes missing, including fees, costs, expenses, unpaid duties, and liquidated damages. *Id.*

79. *United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1291 (Fed. Cir. 2014), *petition for cert. docketed sub. nom. Shadadpuri v. United States* (U.S. Feb. 13, 2015) (No. 14-986).

80. *Chemsol, LLC v. United States*, 755 F.3d 1345, 1347–48 (Fed. Cir. 2014); *see* 28 U.S.C. § 1581(i) (providing that the Trade Court has exclusive jurisdiction over certain civil actions against the U.S.).

81. The Federal Circuit devoted nearly one-third of its 2014 international trade decisions to the HTSUS classification process alone.

82. 772 F.3d 728 (Fed. Cir. 2014).

83. 757 F.3d 1374 (Fed. Cir. 2014).

HTSUS.⁸⁴ The HTSUS classification and analysis process set forth by the Federal Circuit consists of the following elements: (1) a recitation of the applicable standard of review;⁸⁵ (2) a description of the HTSUS organization and classification scheme;⁸⁶ (3) a reference to the interpretive guidance provided in and mandated by the HTSUS statute, namely the General Rules of Interpretation (the “GRIs”) and the Additional U.S. Rules of Interpretation (the “ARIs”);⁸⁷ and (4) a reminder that the Explanatory Notes for each HTSUS chapter, while not legally binding (they are published by the World Customs Organization and are not part of the HTSUS statute), are held in high esteem by the Federal Circuit and are “generally indicative of the proper interpretation of a tariff provision.”⁸⁸

Several of the Federal Circuit’s 2014 HTSUS Analysis opinions are discussed below.⁸⁹

I. Roche Vitamins, Inc. v. United States

In *Roche Vitamins, Inc.*, the Federal Circuit addressed the question of the proper HTSUS classification of “BetaTab 20%” (“BetaTab”), a product imported into the United States by Roche Vitamins, Inc.

84. *Roche Vitamins, Inc.*, 772 F.3d at 730–31; *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377–78.

85. According to the Federal Circuit, the HTSUS standard of review involves a two-part analysis: (1) an interpretation of the provisions of the HTSUS, which are questions of law and are reviewed de novo; and (2) a determination of whether an item fits into a specific HTSUS category, which is a question of fact and reviewed for clear error. See *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377 (citing *Lemans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011)); see also *Roche Vitamins, Inc.*, 772 F.3d at 730 (citing *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1335 (Fed. Cir. 2007)) (noting that questions of law are reviewed de novo); *Nat’l Advanced Sys. v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994) (stating that determining whether an item fits within a specific HTSUS category (classifying the item) is a fact question and, therefore, reviewed for clear error).

86. The “HTSUS Description” consists of headings and subheadings, and an item receives a tariff classification if the item falls within a particular HTSUS heading and subheading. *Roche Vitamins, Inc.*, 772 F.3d at 730; *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377.

87. *Roche Vitamins, Inc.*, 772 F.3d at 730–31; *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377–78.

88. *Roche Vitamins, Inc.*, 772 F.3d at 731 (expounding the “Explanatory Notes” rule).

89. Because of the similarity of issues, this Article does not review a few of those cases, including *Victoria’s Secret Direct, LLC v. United States*, 769 F.3d 1102 (Fed. Cir. 2014); *R.T. Foods, Inc. v. United States*, 757 F.3d 1349 (Fed. Cir. 2014); *Riddell, Inc. v. United States*, 754 F.3d 1375 (Fed. Cir. 2014); and *Link Snacks, Inc. v. United States*, 742 F.3d 962 (Fed. Cir. 2014).

(Roche).⁹⁰ Roche's BetaTab product "is a mixture containing beta-carotene, antioxidants, gelatin, sucrose, and corn starch, and can be used as a source of Vitamin A in foods, beverages, and vitamin products . . . [or as] an organic colorant with provitamin A activity."⁹¹ As the Federal Circuit noted, "[w]hether used as a colorant or provitamin A, beta-carotene must first be combined with other ingredients," including certain stabilizing agents, to make any beta-carotene product "commercially useable as either a provitamin A or colorant."⁹²

When Roche imported BetaTab into the United States, CBP classified BetaTab under subheading 2106.90.97 of the HTSUS, which pertains to "[f]ood preparations not elsewhere specified or included."⁹³ After CBP denied Roche's petition to reclassify BetaTab, Roche filed suit in the Trade Court, where it argued that CBP should classify BetaTab as "a 'coloring matter' under HTSUS subheading 3204.19.35, and eligible for duty-free entry pursuant to the Pharmaceutical Appendix, or, alternatively, as a provitamin under HTSUS heading 2936."⁹⁴ After denying Roche's motion for summary judgment, the Trade Court tried the case and ultimately concluded that BetaTab should be classified under HTSUS heading 2936 (provitamins) and subheading 2930.10.00 ("Provitamins, unmixed").⁹⁵ The United States appealed.⁹⁶

On appeal, the Federal Circuit set forth the proper analytic framework for classifying goods and merchandise imported into the United States under the HTSUS. To begin with, the Federal Circuit reviews the Trade Court's interpretation of the terms and provisions of the HTSUS *de novo*, because this interpretation involves a question of law,⁹⁷ but reviews the classification of items under an HTSUS heading or subheading for clear error, as this classification involves a question of fact.⁹⁸

90. *Roche Vitamins, Inc.*, 772 F.3d at 729.

91. *Id.*

92. *Id.* at 729–30.

93. *Id.* at 729 (alteration in original) (internal quotation marks omitted).

94. *Id.*

95. *Id.* at 729–31.

96. *Id.* at 730.

97. *Id.* (citing *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1335 (Fed. Cir. 2007)).

98. *Id.* (citing *Nat'l Advanced Sys. v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994)).

When items are imported into the United States, they are classified under the HTSUS.⁹⁹ With respect to the structure of the HTSUS, the Federal Circuit explained that

[t]he HTSUS scheme is organized by headings, each of which has one or more subheadings; the headings set forth general categories of merchandise, and the subheadings provide a more particularized segregation of the goods within each category. The classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and the Additional U.S. Rules of Interpretation.¹⁰⁰

Further, in determining whether an item should be classified under a specific HTSUS heading or subheading, the Federal Circuit stated that

GRI 1 provides that “for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the [remaining GRIs.]” The Chapter Notes are an integral part of the HTSUS, and have the same legal force as the text of the headings.¹⁰¹

The Federal Circuit also explained that, while not considered to be mandatory or binding authority, the Explanatory Notes for the various HTSUS Chapters “may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision.”¹⁰²

In applying the HTSUS Analysis to Roche’s BetaTab product, the Federal Circuit noted that “BetaTab . . . fulfills the description in the statutory heading and satisfies the limitations of both Note 1 to Chapter 29 and Explanatory Note 29.36” and concluded that “no interpretation of HTSUS terms is before us.”¹⁰³ Consequently, the Federal Circuit upheld the Trade Court’s conclusion that, as a matter of law, “BetaTab is accurately described as a provitamin of heading 2936, subject to the limitations of Note 1 to Chapter 29 and Explanatory Note 29.36.”¹⁰⁴

The Federal Circuit then reviewed, for clear error, the Trade Court’s classification of BetaTab under HTSUS subheading

99. *Id.*

100. *Id.* (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

101. *Id.* at 730–31 (alteration in original) (citation omitted) (internal quotation marks omitted).

102. *Id.* at 731 (citing *Motorola, Inc. v. United States*, 436 F.3d 1357, 1361 (Fed. Cir. 2006)).

103. *Id.* at 732.

104. *Id.*

2936.10.00 and upheld the Trade Court's decision in that respect.¹⁰⁵ In reaching this conclusion, the Federal Circuit evaluated whether the stabilizing agents and other ingredients in BetaTab or the manufacturing processes Roche used (including the addition of the stabilizing agents and other ingredients) to produce BetaTab either "(1) alter[ed] the character of the basic product [or] (2) render[ed] it particularly suitable for specific use rather than for general use."¹⁰⁶

Noting that the United States had abandoned arguments concerning the amount of stabilizing agents present in BetaTab, the Federal Circuit first considered whether BetaTab's ingredients or Roche's manufacturing processes altered the character of the underlying beta-carotene product.¹⁰⁷ Citing the evidence adduced at trial—including the testimony of the government's expert witness "that Roche's manufacturing process does not change BetaTab's functionality as provitamin A or change the character of the beta-carotene as provitamin A"—the Federal Circuit held that the Trade Court "did not clearly err in finding that the additional ingredients and processing do not alter the character of the beta-carotene."¹⁰⁸

The Federal Circuit then went on to consider whether BetaTab's stabilizing agents and other ingredients or Roche's manufacturing processes rendered BetaTab particularly suitable for a specific, rather than a general, use.¹⁰⁹ Again, the Federal Circuit pointed to evidence in the record, including expert testimony that "[certain] additives function as stabilizers and do not specifically prepare [BetaTab] for tableting."¹¹⁰ The court also noted that the stabilizing agents Roche used in BetaTab "were essentially the same as those used to stabilize other vitamins and other beta-carotene products that were marketed for use as colorants."¹¹¹ Based on this evidence, the Federal Circuit determined that "BetaTab also remains suitable for general use."¹¹² Consequently, the Federal Circuit concluded

105. *Id.* at 729, 732–33.

106. *Id.* at 732.

107. *Id.* ("Note 1(f) to Chapter 29 permits the addition of stabilizer ingredients to BetaTab, as long as the amount of stabilizer added is not more than necessary for preservation or transport.")

108. *Id.*

109. *Id.*

110. *Id.* (second alteration in original) (internal quotation marks omitted).

111. *Id.*

112. *Id.* at 733.

that the Trade Court “did not clearly err in finding that BetaTab remains suitable for general use.”¹¹³

2. Dependable Packaging Solutions, Inc. v. United States

The Federal Circuit in *Dependable Packaging Solutions, Inc.* also discussed the proper approach to classifying merchandise under the HTSUS. Dependable Packaging Solutions, Inc. (“Dependable”) imported two types of glass vases, which Dependable described “on their respective commercial invoices as ‘Generic Bud Vases’ for the smaller (‘bud vases’) and ‘Generic Trumpet Vases’ (‘trumpet vases’) for the larger [vases].”¹¹⁴ The import value of the vases was low, totaling \$0.30 for the bud vases and between \$0.30 and \$3.00 for the trumpet vases.¹¹⁵ As the Federal Circuit noted,

[a]fter importing the vases, Dependable sells them to mass-market flower-packing houses that fill them with water and flowers. The packing houses then ship the flower-packed vases to supermarkets or similar retailers, where the vase and flower combinations are displayed and sold as a single unit. Similar vases are sold empty at retail. Dependable’s vases are not sold empty at retail, though they can be reused.¹¹⁶

When the vases entered into the United States, Dependable classified both types of vases under HTSUS subheading 7018.90.50,¹¹⁷ but at liquidation, CBP classified the vases under different HTSUS subheadings.¹¹⁸ Specifically, CBP classified the trumpet vases under HTSUS subheading 7013.99.50.5, which has a tariff rate of thirty percent,¹¹⁹ and the bud vases under subheading 7013.99.404, which has a tariff rate of thirty-eight percent.¹²⁰ Dependable filed a protest,

113. *Id.*

114. *Dependable Packaging Solutions, Inc. v. United States*, 757 F.3d 1374, 1375 (Fed. Cir. 2014).

115. *Id.*

116. *Id.* at 1375–76.

117. *Id.* at 1376. According to the Federal Circuit, this HTSUS subheading covers “[g]lass beads, imitation pearls, imitation precious or semiprecious stones and similar glass small wares and articles thereof other than imitation jewelry” *Id.* at 1376 n.2.

118. *Id.* at 1376.

119. *Id.*; U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2015) subheading 7013.99.50 (2015) (pertaining to “[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)” with a value between \$0.30 and \$3.00).

120. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1376; U.S. INT’L TRADE COMM’N, *supra* note 119, at subheading 7013.99.40.

but since CBP did not act on the matter within thirty days, Dependable's petition was denied.¹²¹

Thereafter, Dependable filed an action with the Trade Court, arguing that both of the vases should have been classified under HTSUS heading 7010.¹²² As the Federal Circuit noted, HTSUS heading 7010 "includes containers, of glass, of a kind used for the conveyance or packing of goods."¹²³ The Trade Court reviewed the HTSUS classifications proffered by Dependable and CBP, analyzed the language of the respective HTSUS headings, and performed a "principal use analysis" to determine under which HTSUS heading the vases would fit.¹²⁴ After performing an analysis¹²⁵ under *United States v. Carborundum Co.*,¹²⁶ the Trade Court granted summary judgment in favor of CBP and upheld CBP's classification of the vases.¹²⁷ Dependable appealed.¹²⁸

121. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1376.

122. *Id.*

123. *Id.* (internal quotation marks omitted).

124. *Id.* at 1376–77 & n.3. A "principal use analysis" is performed "to determine the proper heading for the imported merchandise [under the HTSUS]." *Id.* at 1376 n.3 (citing *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312–13 (Fed. Cir. 2012)). In *Aromont*, the Federal Circuit explained that a principal use analysis occurs when a tariff classification heading in the HTSUS describes the way the imported item is to be used. *Aromont USA, Inc.*, 671 F.3d at 1312. This is opposed to an *eo nomine* analysis, which is performed when the tariff classification in the HTSUS "describes an [imported] article by a specific name, not by use." *Id.* (citing *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011)).

125. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1376 n.3 ("When, as here, the [Trade Court] performs a principal use analysis to determine the proper heading for the imported merchandise, the [Trade Court] analyzes several factors, commonly referred to as the 'Carborundum factors,' in order to determine which goods are 'commercially fungible with the imported goods.'" (quoting *Aromont USA, Inc.*, 671 F.3d at 1312–13)).

126. 536 F.2d 373 (C.C.P.A. 1976). According to the *Carborundum* court, the following factors should be considered in resolving the question of whether a commodity imported into the United States should fall within a specific type, kind, or class of commodity:

[T]he general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale . . . , the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling.

Id. at 377 (citations omitted).

127. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377.

128. *Id.*

On appeal, the Federal Circuit performed an HTSUS analysis, noting that it reviews de novo those grants of summary judgment by the Trade Court with respect to HTSUS classifications.¹²⁹ The Federal Circuit then followed the Trade Court's two-prong analysis to analyze CBP's tariff classifications and performed an HTSUS analysis with respect to the vases.¹³⁰ Importantly, since there was no dispute as to the nature of the goods being classified (i.e., that the items were glass vases), "the inquiry collapse[d] into a question of law [that the Federal Circuit] review[ed] de novo."¹³¹

Again, the Federal Circuit undertook to explain, in detail, the process for performing an HTSUS analysis with respect to goods imported into the United States.¹³² The court recognized that while the parties agreed that the vases should be classified under HTSUS chapter 70 as "glass and glassware," they disagreed about how to classify them under a heading within the chapter.¹³³ According to the court,

[c]urrently the subject merchandise is classified under heading 7013, which provides for "[g]lassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018)." Dependable argues the vases should be classified under heading 7010, which includes "containers, of glass, of a kind used for the conveyance or packing of goods."¹³⁴

After concluding that Dependable's merchandise consisted of vases and not just glass containers, the Federal Circuit ruled that the Trade Court properly focused its analysis on whether Dependable's vases should be classified under HTSUS heading 7013.¹³⁵ The Federal Circuit then reviewed the Trade Court's analysis and decision to approve CBP's classification of the vases.¹³⁶ Since Dependable challenged the Trade Court's classification of the vases under HTSUS

129. *Id.* (citing *Lemans Corp. v. United States*, 660 F.3d 1311, 1315 (Fed. Cir. 2011); *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).

130. *Id.* (citing *Lemans Corp.*, 66 F.3d at 1315); *c.f.*, *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1335 (Fed. Cir. 2007) (describing how the classification of subject goods should be reviewed for clear error because it is a factual inquiry).

131. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1377 (quoting *Lemans Corp.*, 660 F.3d at 1315).

132. *Id.* at 1377–78 (identifying different authorities to support the major provisions of the HTSUS Classification Analysis).

133. *Id.* at 1378.

134. *Id.*

135. *Id.* at 1378–79.

136. *Id.* at 1379.

heading 7013, the Federal Circuit reviewed the principal use analysis performed by the Trade Court.¹³⁷

As previously mentioned, the Trade Court had performed a principal use analysis by applying the *Carborundum* factors to the merchandise at issue.¹³⁸ After determining that “nearly every *Carborundum* factor weighs heavily in favor of classifying Dependable’s merchandise under heading 7013,” the Federal Circuit upheld the Trade Court’s grant of summary judgment in favor of CBP’s classifications of Dependable’s vases under HTSUS subheadings 7013.99.40 (bud vases) and 7013.99.50 (trumpet vases).¹³⁹

3. Deckers Corp. v. United States

In *Deckers Corp.*, the Federal Circuit considered the proper HTSUS classification of Teva® Sport Sandals, which Deckers Corporation (“Deckers”) imported into the United States from Hong Kong.¹⁴⁰ The Federal Circuit described the sandals as follows:

The Sport Sandals all have rubber or plastic soles and cloth or textile straps in the upper portion of the shoe. Importantly, the toe and heel sections of all of the Sports Sandals at issue are open, and the upper section of the Sport Sandals do not fully enclose the foot. The Sports Sandals are shoes intended [for use in] athletic pursuits, such as running, jogging, hiking, canyoneering, and a variety of water-based activities.¹⁴¹

CBP initially classified and liquidated the Sport Sandals under HTSUS subheading 6404.19.35, with items covered under this subheading being subject to a duty of 37.5%.¹⁴²

In 2001, Deckers brought an action in the Trade Court,¹⁴³ challenging CBP’s classification of the Sports Sandals and arguing that the Sports Sandals should be classified under subheading 6404.11 (and therefore subject to a lower customs duty) because the

137. *Id.* at 1378–80.

138. *See supra* note 126 (listing the *Carborundum* factors).

139. *Dependable Packaging Solutions, Inc.*, 757 F.3d at 1383.

140. *Deckers Corp. v. United States*, 752 F.3d 949, 951 (Fed. Cir. 2014).

141. *Id.* (citations omitted).

142. *Id.* (“6404 Footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile material . . .” (quoting U.S. INT’L TRADE COMM’N, *supra* note 119, at subheading 6404)). The Federal Circuit goes on to quote subheading 6404.19.35 as follows: “6404.19.35 Other.” *Id.* (quoting U.S. INT’L TRADE COMM’N, *supra* note 119, at subheading 6404.19.35).

143. *Deckers* is the latest in a line of cases, going back to 2001, brought by Deckers to challenge the classification of its Sport Sandals under the HTSUS. *See infra* note 153.

examples appearing therein seemed to apply to the Sports Sandals.¹⁴⁴ According to the Federal Circuit, in order to prevail upon this claim, the Sport Sandals “must fit the description in subheading 6404.11—they must be ‘sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes *and the like*.’”¹⁴⁵

At trial, the Trade Court applied an *ejusdem generis* analysis¹⁴⁶ to determine whether the “and the like” provision of 6404.11 could be construed to cover the Sports Sandals.¹⁴⁷ However, the Trade Court rejected Deckers’s arguments, holding that the Sports Sandals were properly classified under subheading 6404.19.35 and not 6404.11 “because they were ‘sandals,’ and not ‘shoes’” and that “it is for Congress, not the courts, to alter the HTSUS provisions to cover [the Sport Sandals].”¹⁴⁸ Deckers appealed to the Federal Circuit, where it argued that its Sports Sandals were properly classified under HTSUS subheading 6404.11 because the “essential characteristic of the listed exemplars was that they were all athletic footwear.”¹⁴⁹

On appeal, the Federal Circuit performed its own *ejusdem generis* analysis to determine whether the “and the like” provision of subheading 6404.11 applied to the Sport Sandals.¹⁵⁰ The Federal Circuit rejected this interpretation because Deckers’s position that subheading 6404.11 should apply to the Sports Sandals was just a repackaged version of its Additional Note 2 argument advanced before the Trade Court.¹⁵¹ In so doing, the Federal Circuit held that

[t]he evidence adduced at trial established that the *fundamental feature that the exemplars share is the design, specifically the enclosed upper*, which contains features that stabilize the foot, and protect against abrasion and impact. Because the sandals at issue have open toes and open heels, and lack the features of the named

144. *Deckers Corp.*, 752 F.3d at 951–52 (indicating that subheading 6404.11 includes “[s]ports footwear; tennis shoes, basketball shoes, gym shoes, training shoes and the like” and noting that Deckers’s argument was based on Additional Note 2 to HTSUS subheading 6404, which clarifies that subheading 6404.11 concerns “athletic footwear” (internal quotation marks omitted)).

145. *Id.* (emphasis added) (citing U.S. INT’L TRADE COMM’N, *supra* note 119, at subheading 6404.11).

146. *Id.* at 952 n.3 (“In an *ejusdem generis* analysis, ‘where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.’” (quoting *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994))).

147. *Id.* at 952 (internal quotation marks omitted).

148. *Id.* at 952–53 (internal quotation marks omitted).

149. *Id.* at 953.

150. *Id.* (internal quotation marks omitted).

151. *Id.*

exemplars of 6404.11.80, HTSUS, the imported goods are not classifiable under that subheading, *notwithstanding their claimed status as athletic footwear*.¹⁵²

In 2010, given the unique procedural history of the underlying matters,¹⁵³ Deckers was able to bring an action in the Trade Court, again arguing that the Sport Sandals are properly classified under subheading 6404.11—this time, on the basis that the Sport Sandals “fit within the *eo nomine* category of ‘training shoes’ in subheading 6404.11.”¹⁵⁴ However, the Trade Court again ruled against Deckers because “the holding in *Deckers I* [the prior Federal Circuit case on this issue] precluded it from classifying the Sports Sandals under subheading 6404.11 [since] the Sports Sandals did not have enclosed uppers.”¹⁵⁵ As the Federal Circuit noted, “[b]ecause the merchandise at issue was admittedly of the same character as in [*Deckers I*], the Court of International Trade [also] held that it was bound by the holding of *Deckers I* under principles of stare decisis.”¹⁵⁶ Accordingly, Deckers appealed.¹⁵⁷

On appeal, Deckers made arguments falling into two categories.¹⁵⁸ First, Deckers argued that the Trade Court erred because it did not analyze new evidence produced by Deckers and, thereby, prevented Deckers from arguing that stare decisis should not apply to the opinion below.¹⁵⁹ Second, Deckers argued that the Trade Court “erred in holding that stare decisis limited its classification decision because this appeal presents an issue of law that was not before the panel in *Deckers I*.”¹⁶⁰ In support of its arguments, Deckers claimed that another Federal Circuit case,

152. *Id.*

153. *Id.* (reciting the unique procedural history of the HTSUS classification litigation concerning the Sports Sandals). As the court noted, Deckers initially filed a test case in the Trade Court, challenging the classification of its Sport Sandals under the HTSUS, and the Federal Circuit resolved the test case in *Deckers Corp. v. United States*, 532 F.3d 1312 (Fed. Cir. 2008). Subsequently, because of procedural matters undertaken in the test case, Deckers brought a second action to challenge the classification of its Sports Sandals under the HTSUS, *Deckers Corp. v. United States (Deckers I)*, No. 02-00732, 2013 WL 1924357 (Ct. Int’l Trade Apr. 12, 2013), *aff’d*, 752 F.3d 949 (Fed. Cir. 2014), the action being reviewed in the instant case.

154. *Deckers Corp.*, 752 F.3d at 953.

155. *Id.* (citing *Deckers I*, 2013 WL 1924357, at *4).

156. *Id.* at 954 (citing *Deckers I*, 2013 WL 1924357, at *4–5).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Schott Optical Glass, Inc. v. United States,¹⁶¹ “permits any court—including any subsequent panel of this court—to review a prior interpretation of a classification provision by this court and to disregard that interpretation upon a showing of clear error.”¹⁶²

The government, on the other hand, argued that “basic principles of stare decisis and concepts of what constitutes binding precedent prevent either the [Trade Court] or [the Federal Circuit] from reconsidering the legal principle set forth in *Deckers I*.”¹⁶³ For this reason, the government argued, the Federal Circuit could not re-visit the holding of *Deckers I* because the instant appeal “involve[d] the construction of subheading 6404.11,” *Deckers I* already analyzed “the term ‘training shoes’” with respect to the instant appeal, and the instant appeal “[did] not present [any] new legal issue[s]” for adjudication.¹⁶⁴ Agreeing with the government, the Federal Circuit affirmed.¹⁶⁵

In reaching this decision, the Federal Circuit cited the U.S. Supreme Court for the proposition that “[s]tare decisis ‘protects the legitimate expectations of those who live under the law’ and prevents ‘an arbitrary discretion in the courts’” and also noted that the Supreme Court has declared that stare decisis encourages predictability and reliability in the judicial process.¹⁶⁶ The court added,

[s]tare decisis “deals only with law” and each prior precedential holding of the court becomes a “statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decision.” *Stare decisis*, therefore, is limited to only the legal determinations made in a prior precedential opinion and does not apply to either issues of fact, such as classification of specific goods within a construed tariff provision, or issues of law that were not part of a holding in a prior decision.¹⁶⁷

Additionally, the Federal Circuit highlighted how it “use[s] both *eo nomine* and *eiusdem generis* analyses to determine the common meaning of a classification term and to establish congressional intent

161. 750 F.2d 62 (Fed. Cir. 1984).

162. *Deckers Corp.*, 752 F.3d at 954–55.

163. *Id.* at 955.

164. *Id.*

165. *Id.*

166. *Id.* (quoting *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment)).

167. *Id.* at 956 (citations omitted).

with respect to an HTSUS subheading.”¹⁶⁸ Ultimately, the Federal Circuit rejected Deckers’s argument and held that *Deckers I* involved the construction of subheading 6404.11.¹⁶⁹ The Federal Circuit also rejected Deckers’s claim that *Schott Optical* permits a Federal Circuit panel (or the Trade Court, for that matter) to overturn the conclusions of a previous Federal Circuit panel decision, noting that, “[i]n this Circuit, a later panel is bound by the determinations of a prior panel, unless relieved of that obligation by an en banc order of the court or a decision of the Supreme Court.”¹⁷⁰

However, after reviewing the historical and statutory bases behind its unique approach to stare decisis, the Federal Circuit somewhat modified its stare decisis jurisprudence, stating that

while a party may challenge a prior construction of a tariff provision by a panel of this court in a classification case and may seek to introduce evidence of purported clear error in the prior classification to preserve the issue for potential en banc review, both the Court of International Trade and any subsequent panel of this court are bound by the earlier panel’s classification construction. It is only as an en banc court that [the Federal Circuit] can review and alter a tariff classification construction by a prior panel. This approach is consistent with [the Federal Circuit’s] treatment of *stare decisis* in other areas of law and is consistent with the approach of [its] predecessor court, the [United States Court of Customs and Patent Appeals].¹⁷¹

4. *Belimo Automation A.G. v. United States*

In *Belimo Automation A.G. v. United States*,¹⁷² an importer, Belimo Automation, protested CBP’s classification of several of its products as “electric motors” under HTSUS subheading 8501.10.40, arguing that its products should have been classified under HTSUS subheading 9032.89.60, which pertains to “automatic regulating and controlling instruments and apparatus; parts and accessories thereof.”¹⁷³ Belimo’s products, which “consist[ed] of an electric motor, gears,

168. *Id.* at 957. Interestingly, the Federal Circuit performed another *ejusdem generis* analysis, which, while not necessary when “the common meaning of an *eo nomine* term is apparent,” may aid in determining congressional intent. *Id.* at 958.

169. *Id.* at 958.

170. *Id.* at 959.

171. *See generally id.* at 959–66 (describing the evolution of stare decisis in the U.S. Court of Customs and Patent Appeals and the Federal Circuit and focusing on the Federal Circuit’s decision in *Schott Optical*).

172. 774 F.3d 1362 (Fed. Cir. 2014).

173. *Id.* at 1363 (internal quotation marks omitted).

and two printed circuit boards,” were used in heating, ventilating, and air conditioning (HVAC) systems to help maintain the temperature set by the HVAC user.¹⁷⁴

Belimo’s products were unique because “they incorporate a programmed Application Specific Integrated Circuit (‘ASIC’),” which “operates independently from the central controller [of an HVAC system] and can detect unintended changes in [the system’s] damper blade position[, thereby allowing] it to better maintain the blade’s position against disturbances.”¹⁷⁵ Although Belimo’s ASIC product allowed the HVAC system to maintain the temperature set by the user, the ASIC also performed certain other independent functions.¹⁷⁶

In the protest filed with CBP, Belimo argued that its products should have been classified under HTSUS 9032.89.60 because the ASIC “measures [air] flow *indirectly*, using the changes in damper blade position as a reference”¹⁷⁷ and, thereby, satisfies the requirements of clauses one and three of HTSUS Chapter 90 Note 7(a). CBP denied Belimo’s protest, holding that Belimo’s products were properly classified as electric motors under HTSUS heading 8501.¹⁷⁸ Belimo then appealed to the Trade Court, which held that Belimo’s products could not be classified under heading 9032 “because they do not automatically measure the actual value of the temperature or any variable of air, as required by HTSUS Chapter 90, Note 7(a),” and that Belimo’s products were properly classified under heading 8501 (electric motors).¹⁷⁹

Noting that the interpretation of terms appearing in the HTSUS involves “pure questions of law,” the Federal Circuit reviewed the Trade Court’s classification of Belimo’s products *de novo*.¹⁸⁰ After reviewing the function of the ASIC against the plain text of clauses one and three of Note 7(a), the court reasoned that the ASIC did not measure the actual value of airflow through the HVAC system.¹⁸¹ Accordingly, the Federal Circuit concluded that the ASIC could not

174. *Id.*

175. *Id.*

176. *Id.* (citing *Belimo Automation A.G. v. United States*, No. 10-00113, 2013 WL 6439119, at *2 (Ct. Int’l Trade Nov. 26, 2013), *aff’d*, 774 F.3d 1362 (Fed. Cir. 2014)).

177. *Id.* at 1363, 1365.

178. *Id.* at 1364.

179. *Id.* at 1364, 1366 (internal quotation marks omitted).

180. *Id.* at 1364.

181. *Id.* at 1364–65.

be categorized under heading 9032, thereby rejecting Belimo's argument that the ASIC indirectly measures airflow.¹⁸²

Having thus rejected Belimo's arguments that the ASIC should be classified under heading 9032, the Federal Circuit moved on to consider whether the ASIC should be classified under heading 8501.¹⁸³ In performing this analysis, the Federal Circuit reviewed Note 3 to Section XVI, which includes HTSUS heading 8501 and states, in relevant part, that "machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as . . . that machine which performs the principal function."¹⁸⁴

Observing that the ASIC possessed additional functions to enhance the "precision and reliability of the" HVAC system damper blade actuator's motor operation, the Federal Circuit concluded that such functions were "complementary" to the device's principle function "to assist in moving the damper blades."¹⁸⁵ Consequently, the Federal Circuit upheld the classification of Belimo's products as motors under HTSUS heading 8501.¹⁸⁶

5. GRK Canada, Ltd. v. United States

In *GRK Canada, Ltd. v. United States*,¹⁸⁷ the Federal Circuit reviewed a decision of the Trade Court with respect to CBP's classification of screws under the HTSUS.¹⁸⁸ GRK imported three models of screws, all of which, according to the Federal Circuit, "are made with corrosion-resistant case-hardened steel, and . . . are marketed for use in carpentry as building material fasteners."¹⁸⁹ Each model is "available in a variety of lengths, diameters, and thread designs."¹⁹⁰ One model, GRK's R4 screw, was designed with "a flat self-countersinking head designed to cut away at the top layer of the material as the screw is driven into place."¹⁹¹ The other models, the "RT and Fin/Trim screws[,] are recommended for fine carpentry and trim applications, and . . . have much smaller heads that . . . prevent

182. *Id.* at 1365–66.

183. *Id.* at 1366.

184. *Id.* (internal quotation marks omitted).

185. *Id.*

186. *Id.*

187. 761 F.3d 1354 (Fed. Cir. 2014).

188. *Id.* at 1355.

189. *Id.*

190. *Id.* at 1356.

191. *Id.* at 1355 (footnote omitted).

the screws from cracking and splitting the target material.”¹⁹² The Federal Circuit further stated that the “RT screws, unlike Fin/Trim screws, include reverse threading, a second set of threads near the head that allows the head to be less noticeable along the surface of the target material.”¹⁹³

In 2008, GRK imported these screws into the United States.¹⁹⁴ At that time, the CBP classified the screws under the “other wood screws” heading of the HTSUS, which resulted in the assessment of a 12.5% *ad valorem* duty at liquidation.¹⁹⁵ GRK protested to CBP, claiming that their screws should have been classified under the “self-tapping screws” heading of the HTSUS, which would have resulted in the assessment of a 6.2% *ad valorem* duty on the import of these screws.¹⁹⁶ CBP denied GRK’s protest, and GRK challenged CBP’s decision in the Trade Court.¹⁹⁷ Both parties moved for summary judgment, and the Trade Court ultimately sustained GRK’s challenge and permitted its screws to be classified as “self-tapping screws” under the HTSUS.¹⁹⁸

On appeal, the Federal Circuit reversed the Trade Court.¹⁹⁹ To begin with, the Federal Circuit noted that both parties agreed that the terms “other wood screws” and “self-tapping screws” were *eo nomine* provisions under the HTSUS and that *eo nomine* provisions without limiting terms generally “include all forms of the named article.”²⁰⁰ The court explained that “[a]lthough an *eo nomine* provision generally ‘describes the merchandise by name, not by use,’ such a provision may be limited by use when ‘the name itself inherently suggests a type of use.’”²⁰¹ In those cases, such items may fall outside of *eo nomine* classification and require the Trade Court to perform a use analysis to properly classify them.²⁰² Accordingly, the Federal Circuit vacated the Trade Court’s classification of GRK’s screws and remanded the case to the Trade Court for further

192. *Id.*

193. *Id.* at 1355–56.

194. *Id.* at 1356.

195. *Id.* (internal quotation marks omitted).

196. *Id.* (internal quotation marks omitted).

197. *Id.*

198. *Id.* at 1356–57.

199. *Id.* at 1361.

200. *Id.* at 1357–58 (quoting *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)) (internal quotation marks omitted).

201. *Id.* at 1358 (quoting *Hayes–Sammons Chem. Co. v. United States*, 55 C.C.P.A. 69, 75 (1968)).

202. *Id.*

proceedings.²⁰³ In so doing, the Federal Circuit denied GRK's petition for rehearing.²⁰⁴

6. Alcan Food Packaging (Shelbyville) v. United States

In *Alcan Food Packaging (Shelbyville) v. United States*,²⁰⁵ the Federal Circuit reviewed a decision of the Trade Court concerning the proper classification of Flexalcon, an aluminum-plastic laminated food-packaging product imported by Alcan Food Packaging (Shelbyville) ("Alcan").²⁰⁶ Alcan imported Flexalcon for use in packaging Meals Ready to Eat ("MREs") used by the U.S. Armed Forces.²⁰⁷ According to the Federal Circuit, Flexalcon "is a flat, multi-layer material that comes in two configurations: a four-layer material for the base of a package and a three-layer material for the lid. Each configuration has a thin layer of aluminum foil sandwiched between layers of plastic."²⁰⁸

The court also emphasized that each layer of Flexalcon, together with the material chosen for use in that particular layer, plays an important role in "the military's requirements for flexible food packaging."²⁰⁹ For example, the court noted that the plastic layers allow the packaging to be sterilized and sealed with an air-tight seal, adding strength and preventing the material failures that can occur with aluminum foil, while the aluminum layers serve as robust barriers, "substantially prevent[ing] the penetration of light, water vapor, oxygen, and other harmful contaminants that would degrade the packaging's food contents."²¹⁰

Alcan imported Flexalcon into the United States, classifying it under HTSUS subheading 7607.20.50, which does not have a duty rate.²¹¹ Subsequently, CBP reclassified Flexalcon under HTSUS subheading 3921.90.40, which has a duty rate of 4.2%.²¹² Alcan filed

203. *Id.* at 1361.

204. *Id.*

205. 771 F.3d 1364 (Fed. Cir. 2014).

206. *Id.* at 1364–65.

207. *Id.* at 1365.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* ("[A]luminum foil (whether or not printed, or backed with paper, paperboard, plastics or similar backing materials) of a thickness (excluding any backing) not exceeding 0.2 mm: Backed: Other." (internal quotation marks omitted)).

212. *Id.* ("[O]ther plates, sheets, film, foil and strip, of plastics: Other: Flexible." (internal quotation marks omitted)).

a protest of the reclassification with CBP, which CPB denied.²¹³ Alcan then filed suit in the Trade Court, arguing that Flexalcon was properly classified under subheading 7607.20.50 rather than subheading 3921.90.40.²¹⁴ However, on summary judgment, the Trade Court ruled in favor of the government, and Alcan appealed.²¹⁵

The Federal Circuit applied the HTSUS analysis set forth in *Roche* and *Dependable Packaging* and held that Flexalcon was properly classified under heading 3921.²¹⁶ In determining whether to classify Flexalcon under HTSUS heading 3921 or 7607, the Federal Circuit indicated that it was required to interpret the HTSUS classification headings under the GRIs.²¹⁷ Consequently, the court proceeded to apply the GRIs in numerical order, observing that if one rule sufficed to resolve the classification question, it was unnecessary to resort to subsequent rules. In conducting this analysis, the court began with GRI 1.²¹⁸ Under GRI 1,

The classification of merchandise under the HTSUS is governed by the principles set forth in the GRIs [(General Rules of Interpretation)] and the Additional U.S. Rules of Interpretation. We apply the GRIs in numerical order; if a particular rule resolves the classification issue, we do not look to subsequent rules.

GRI 1 says, in relevant part, that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.” When GRI 1 does not resolve the issue of “classification of goods consisting of more than one material or substance,” GRI 2(b) requires application of “the principles of rule 3.” Rule 3 states three rules for composite goods that *prima facie* fit within multiple headings: first, the heading that more specifically describes the goods applies, GRI 3(a); second, if no heading is more specific, then the goods are “classified as if they consisted of the material or component which gives them their essential character,” GRI 3(b); third, if the first two options fail to decide the issue, the goods are classified under the applicable heading that occurs last in numerical order, GRI 3(c).²¹⁹

Here, since Flexalcon “is made of laminated layers of aluminum and plastic,” the Federal Circuit was confronted with performing a

213. *Id.*

214. *Id.*

215. *Id.* at 1365–66.

216. *Id.* at 1367.

217. *Id.* at 1366.

218. *Id.*

219. *Id.* (citations omitted) (internal quotation marks omitted).

classification analysis on a composite product.²²⁰ In performing this analysis, the Federal Circuit began by considering “whether Flexalcon is classifiable according to the headings and notes under either heading 3921 or 7607.”²²¹ If Flexalcon was properly classified under heading 3921, then, under GR 1, the court would not need to proceed further.²²²

Turning to the HTSUS, the court noted that “[h]eading 3921 covers ‘[o]ther plates, sheets, film, foil and strip, of plastics.’ This use of ‘other’ refers to, and thus gathers meaning from, what comes before. Heading 3920 reaches ‘[o]ther plates, sheets, film, foil and strip, of plastics, . . . laminated, supported or similarly combined with other materials.’”²²³ Indeed, the Federal Circuit found clear “[t]he implication . . . that heading 3921 covers relevant ‘other’ plastic goods excluded from 3920 by the phrase after ‘plastics’—that is, it covers plastic goods that . . . are . . . laminated, supported or similarly combined with other materials.”²²⁴ Applying GR 1, the Federal Circuit concluded that Flexalcon was properly classified under HTSUS heading 3921.²²⁵

The Federal Circuit then went on to confront Alcan’s argument that Flexalcon should have been classified under heading 7607 because “Flexalcon is backed aluminum foil as described in heading 7607, [and] that aluminum gives Flexalcon its essential character”²²⁶ The Federal Circuit rejected this argument, holding that a limiting instruction on the face of heading 7607 allows classification under another HTSUS heading.²²⁷ That provision reads, in relevant part, “heading 7607 appl[ies], *inter alia*, to plates, sheets, strip and foil with patterns . . . and [1] to such products which have been perforated, corrugated, polished or coated, [2] provided that they do not thereby assume the character of articles or products of other headings.”²²⁸ Consequently, the Federal Circuit held that “Note 1(d) establishes that the composite product is outside of

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 1366–67 (alterations in original) (U.S. INT’L TRADE COMM’N, *supra* note 119, at heading 3921).

224. *Id.* at 1367 (internal quotation marks omitted).

225. *Id.*

226. *Id.* at 1366.

227. *Id.* at 1367.

228. *Id.* (alterations in original) (internal quotation marks omitted).

heading 7607 when it assumes the character of an article covered by another heading—in this case, heading 3921.”²²⁹

Applying these rules to HTSUS heading 3921, the Federal Circuit concluded that Flexalcon was properly classified under HTSUS heading 3921.²³⁰

III. FEDERAL CIRCUIT REVIEW OF ANTIDUMPING DUTY AND COUNTERVAILING DUTY CASES HEARD BY THE TRADE COURT

A. *Antidumping and Countervailing Duties*

The purpose of the AD and CVD statutes set forth in the Tariff Act is to mitigate and ultimately to prevent certain types of economic injury to U.S. industries.²³¹ Under the Tariff Act, the AD statutes seek to prevent economic injury to U.S. industries resulting from the sale of imported merchandise in the United States at less than fair value.²³² These lower prices cause or threaten to cause material injury to, and threaten the development of, industries in the United States.²³³ Similarly, the CVD statutes of the Tariff Act seek to prevent economic injuries to U.S. industries when a government or public entity of a foreign country subsidizes “the manufacture, production, or export of a class or kind of merchandise imported, or sold . . . for importation, into the United States.”²³⁴ Such subsidization may cause or threaten to cause “material injury” to or “materially retard[]” the development of an industry in the United States.²³⁵

When an “interested party”²³⁶ files a petition with Commerce (which is normally dual-filed with USITC)²³⁷ alleging that a foreign government is providing a countervailable subsidy to producers or importers of merchandise to be imported into the United States, or that an importer has dumped imported merchandise into the

229. *Id.* at 1368.

230. *Id.* at 1367–68.

231. See *Understanding Antidumping & Countervailing Duty Investigations*, U.S. INT’L TRADE COMM’N, http://www.usitc.gov/press_room/usad.htm (last visited Apr. 1, 2015) (explaining the purpose of the AD and CVD statutes). See generally 19 U.S.C. §§ 1671–1677n (2012) (containing the federal AD and CVD statutes).

232. 19 U.S.C. § 1673.

233. *Id.*

234. *Id.* § 1671(a)(1).

235. *Id.* § 1671(a)(2).

236. *Id.* § 1677(9) (defining the term “interested party” as including, among others, foreign manufacturers that export merchandise to the United States and the governments of the countries wherein those foreign manufacturers are located).

237. See *id.* § 1671a(b)(2) (CVD); see also *id.* § 1673a(b)(2) (AD).

United States,²³⁸ the USITC and Commerce conduct parallel investigations. If, at the completion of those parallel investigations, the USITC and Commerce have made the requisite findings, then “Commerce may issue orders imposing duties on imports of goods covered by the investigation.”²³⁹

B. Judicial Review of Antidumping and Countervailing Duty Proceedings

After USITC and Commerce have completed their respective AD/CVD investigations and made the requisite findings or after USITC and Commerce have made certain decisions regarding an AD or CVD investigation, an aggrieved party may file a civil action with the Trade Court.²⁴⁰ As noted above, the Trade Court has exclusive jurisdiction to review the performance and outcome of AD/CVD proceedings at Commerce and the USITC, including the imposition of AD/CVD orders.²⁴¹ In turn, the Federal Circuit has exclusive jurisdiction to review appeals of interlocutory and final decisions of the Trade Court, including second-level appellate review of Trade Court decisions concerning the Trade Court’s review of AD/CVD proceedings before the USITC and Commerce.²⁴²

C. Federal Circuit Review of Antidumping Duty and Countervailing Duty Cases

In 2014, the Federal Circuit reviewed seventeen Trade Court cases concerning antidumping duty and countervailing duty orders and related matters under the Tariff Act. Eleven of those cases involved AD-related matters only.²⁴³ Three cases, including *Guangdong*

238. *Id.* §§ 1671(a), 1673–1673a(a)(1).

239. *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 918 (Fed. Cir. 2014).

240. *See* 19 U.S.C. § 1516a(a)(1)–(2) (establishing the requirements and process for judicial review of decisions not to continue investigating as well as determinations made on the record).

241. 28 U.S.C. § 1581(c).

242. *Id.* §§ 1292(c)(1), 1295(a)(5).

243. *See generally* *Thai Plastic Bags Indus. Co. v. United States*, 774 F.3d 1366 (Fed. Cir. 2014); *Home Meridian Int’l, Inc. v. United States*, 772 F.3d 1289 (Fed. Cir. 2014); *Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281 (Fed. Cir. 2014); *Mukand, Ltd. v. United States*, 767 F.3d 1300 (Fed. Cir. 2014); *Peer Bearing Co.-Changshan v. United States*, 766 F.3d 1396 (Fed. Cir. 2014); *Michaels Stores, Inc. v. United States*, 766 F.3d 1388 (Fed. Cir. 2014); *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378 (Fed. Cir. 2014); *Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371 (Fed. Cir. 2014); *Mueller Comercial de Mex., S. de R.L. de C.V. v. United States*, 753 F.3d 1227 (Fed. Cir. 2014); *Thai Plastic Bags Indus. Co. v. United*

Wireking Housewares & Hardware Co. v. United States, the case that considered whether an amendment to the Tariff Act violated the Ex Post Facto Clause of the U.S. Constitution, addressed both AD- and CVD-related matters,²⁴⁴ and the remaining three cases addressed CVD-related matters only.²⁴⁵ Of these seventeen cases, the Federal Circuit affirmed twelve cases and reversed or vacated the remaining five.

This Part first reviews *Guangdong Wireking* given the constitutional question addressed therein. Then, this Part reviews several of the Federal Circuit 2014 opinions²⁴⁶ pertaining to Commerce's use of adverse inferences against importers (or their governments) for failing to cooperate with AD/CVD investigations²⁴⁷ as well as several of the court's opinions that discuss Commerce's methods for calculating AD/CVD rates. Finally, this Part reviews several of the court's other 2014 AD/CVD opinions because they provide insight into the Federal Circuit's jurisprudence on various issues that can arise in the AD/CVD context.²⁴⁸

States, 746 F.3d 1358 (Fed. Cir. 2014); *Marvin Furniture (Shanghai) Co. v. United States*, 744 F.3d 1319 (Fed. Cir. 2014).

244. See generally *Fedmet Res. Corp. v. United States*, 755 F.3d 912; *Guangdong Wireking Housewares & Hardware Co., Ltd. v. United States*, 745 F.3d 1194 (Fed. Cir. 2014); *Wind Tower Trade Coal. v. United States*, 741 F.3d 89 (Fed. Cir. 2014).

245. See generally *Essar Steel, Ltd. v. United States*, 753 F.3d 1368 (Fed. Cir. 2014); *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365 (Fed. Cir. 2014); *MacLean-Fogg Co. v. United States*, 753 F.3d 1237 (Fed. Cir. 2014).

246. The court's decision in *Essar Steel, Ltd.*, 753 F.3d 1368, is not reviewed in this Article.

247. As used in this Article, the term "adverse inferences" means the range of sanctions described in 19 U.S.C. §§ 1677–1677n that Commerce may use when an "interested party," as defined in § 1677(9), engages in certain misconduct in connection with an AD/CVD investigation. The adverse inferences available to Commerce include, *inter alia*, using "facts otherwise available" if a party withholds or fails to properly provide Commerce with certain information or otherwise impedes the investigation, see § 1677e(a)(2); drawing inferences "adverse to the interests of [a] party" if that party fails to cooperate with Commerce during the investigation, see § 1677e(b); declining to use evidence based on business proprietary information if the party fails to make that information available to Commerce, see § 1677f(b)–(c); or disregarding any information appearing in a deficient response provided to Commerce, see § 1677m(d).

248. Cases not discussed herein include *Thai Plastic Bags Indus. Co.*, 774 F.3d 1366; *Home Meridian Int'l, Inc.*, 772 F.3d 1289; *Hartford Fire Ins. Co.*, 772 F.3d 1281; *Qingdao Sea-Line Trading Co.*, 766 F.3d 1378; *MacLean-Fogg Co.*, 753 F.3d 1237; *Lifestyle Enter., Inc.*, 751 F.3d 1371; *Thai Plastic Bags Indus. Co.*, 746 F.3d 1358; and *Marvin Furniture (Shanghai) Co.*, 744 F.3d 1319.

I. Guangdong Wireking Housewares & Hardware Co. v. United States

In *Guangdong Wireking*, the Federal Circuit considered whether a 2012 revision of the Tariff Act violated the U.S. Constitution when the Act increased the scope and amount of AD/CVD rates imposed on certain items imported from China.²⁴⁹ In 2012, Congress passed an amendment to the Tariff Act that legislatively overruled a decision reached by the Federal Circuit in an earlier case.²⁵⁰

The Federal Circuit noted that prior to the 2012 amendment, the United States did not have an explicit law on how to levy countervailing duties on non-market economy (NME) countries and that Commerce had stated it would not impose such duties.²⁵¹ In 2007, however, Commerce changed course and stated that it would begin levying countervailing duties on products imported from China, a NME country.²⁵²

This policy change triggered the *GPX International Tire Corp. v. United States*²⁵³ litigation. In that 2011 case, two Chinese tire manufacturers argued that countervailing duties imposed on their tires were illegitimate since Commerce could not levy such a duty on imports originating from China.²⁵⁴ After reviewing the history of the Tariff Act and looking at its subsequent amendments and reenactments, the court concluded that “in amending and reenacting the trade laws in 1988 and 1994, Congress adopted [Commerce’s] position that countervailing duty law does not apply to NME countries”²⁵⁵ The court then affirmed the holding of the Trade Court, concluding that countervailing duties did not apply to imports from NME countries.²⁵⁶

However, in 2012, Congress enacted new legislation that “permitted the imposition of both antidumping and countervailing duties with respect to importers from [NME] countries.”²⁵⁷ Specifically, the Federal Circuit observed that the new legislation required that Commerce reduce the duty levied on goods from an NME market in cases of “double count[ing],” instances where,

249. 745 F.3d 1194, 1195–96 (Fed. Cir. 2014).

250. *Id.* (citing *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011), *reh’g granted*, 678 F.3d 1308 (Fed. Cir. 2012)).

251. *Id.* at 1197.

252. *Id.*

253. 666 F.3d 732 (Fed. Cir. 2011), *reh’g granted*, 678 F.3d 1308 (Fed. Cir. 2012).

254. *Guangdong Wireking*, 745 F.3d at 1197 (citing *GPX Int’l Tire Co.*, 666 F.3d at 735).

255. *Id.* (alteration in original) (quoting *GPX Int’l Tire Co.*, 666 F.3d at 745).

256. *Id.* (citing *GPX Int’l Tire Co.*, 666 F.3d at 745).

257. *Id.* at 1196.

because of a single unfair trade advantage, both AD and CVD duties are applied to the goods.²⁵⁸ “This double-counting provision applies only *prospectively* to proceedings initiated after March 13, 2012” but not to any CVD-related proceedings initiated prior to that date.²⁵⁹ Hence, CVD-related proceedings “initiated between November 20, 2006, and March 13, 2012, are subject to both antidumping and countervailing duties but do not benefit from this double-counting adjustment.”²⁶⁰

Around the time the new legislation went into effect, Guangdong Wireking Housewares & Hardware Co., Ltd. (“Wireking”), a Chinese importer, was a “mandatory respondent” for AD and CVD investigations by Commerce in August of 2008 with respect to “certain kitchen appliance shelving and racks from China.”²⁶¹ In these investigations, Commerce reviewed Wireking’s imports for all of 2007 and for the first half of 2008 (January 1, 2008 through June 30, 2008).²⁶² Thereafter, on July 24 and 27, 2009, Commerce issued AD and CVD orders based in part on the results of these investigations.²⁶³

According to the Federal Circuit, in order to determine the antidumping margin and the applicable CVD duty rate, Commerce performed the NME analysis required by the statute at that time.²⁶⁴ Instead of using the “actual home market prices for the inputs Wireking used to manufacture its kitchen shelving and racks, Commerce calculated the margin using a higher, ‘normal value’ for the product’s inputs based on market economy values of the inputs.”²⁶⁵ Commerce then determined that Wireking’s input was steel wire rod.²⁶⁶ As such, Commerce used the “normal value” of the steel wire rods as a surrogate to determine the home market price of Wireking’s imported goods.²⁶⁷ This calculation yielded a 95.99% antidumping duty rate.²⁶⁸

258. *Id.* at 1197.

259. *Id.* at 1197–98 (emphasis in original).

260. *Id.* at 1198.

261. *Id.* A mandatory respondent is an exporter required to fill out a questionnaire from Commerce as part of an AD or CVD investigation.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 1199 (internal quotation marks omitted).

268. *Id.*

Commerce also levied a 13.30% countervailing duty against Wireking.²⁶⁹ The court reasoned that the majority of this duty could be attributed to the price difference between the delivered world market price and the price that Wireking paid for wire rod produced by the Chinese government during the period.²⁷⁰ Commerce divided the duty by Wireking's total sales and calculated Wireking's net countervailable subsidy rate to be 11.76%, a penalty for the wire rod subsidy it had received.²⁷¹

Subsequently, Wireking challenged Commerce's methodology for developing the antidumping margin and imposed CVD rate. In so doing, "Wireking contended that the 'simultaneous imposition of these special NME [antidumping] measures and market economy [countervailing duty] measures . . . demonstrates the imposition of a double remedy' and was improper."²⁷² Commerce rejected this argument and imposed a net CVD rate of 13.30%.

Thereafter, on October 15, 2009, Wireking filed an action in the Trade Court to appeal Commerce's AD and CVD determinations against it.²⁷³ Since Wireking's case raised issues similar to those being litigated in *GPX International Tire Corp.*, the Trade Court stayed the action in its court "pending the outcome of the *GPX* proceedings."²⁷⁴ The *GPX* litigation finally concluded on May 16, 2012, approximately three months after Congress passed the NME Amendment.²⁷⁵

Following the *GPX* litigation, Wireking amended its complaint, raising the constitutional issues present in the instant case.²⁷⁶ The Trade Court ruled in favor of the government, holding that although Commerce imposed both AD and CVD duties on Wireking, Commerce's actions were not penal.²⁷⁷ As a result, Commerce's actions "did not violate the Ex Post Facto Clause even if [they] were retroactive."²⁷⁸

Wireking appealed to the Federal Circuit, which upheld the Trade Court's conclusion that the NME Amendment was not punitive and

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* (alterations in original).

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

did not violate the Ex Post Facto Clause of the U.S. Constitution.²⁷⁹ As the Federal Circuit explained,

Article I, Section 9, Clause 3 of the Constitution states “[n]o Bill of Attainder or ex post facto Law shall be passed.” A law only violates the Ex Post Facto Clause if it (1) applies retroactively and (2) imposes a punishment for an act that was not punishable at the time it was committed or increases the punishment for an act that was committed before the new law was enacted.²⁸⁰

Noting that the AD and CVD investigations were initiated in 2008, that the NME Amendment was passed in 2012, and that the NME Amendment was “[d]esigned to reach all NME countervailing duty proceedings that were ‘initiated . . . on or after November 20, 2006,’” the Federal Circuit concluded that the NME Amendment “applies retroactively to Wireking’s imports before the 2012 legislation.”²⁸¹ Hence, the only remaining question was whether the NME Amendment constituted legislation of a penal nature.²⁸² Given that the NME Amendment was retroactive, the NME Amendment would violate the Ex Post Facto Clause of the Constitution if it were also found to be penal in nature.²⁸³

Although the Tariff Act and the NME Amendment “are civil in nature,” the Federal Circuit stated that “in rare circumstances, the Supreme Court has held that a civil law violates the Ex Post Facto Clause because the law was punitive.”²⁸⁴ The court analyzed the NME Amendment under the Supreme Court’s approach outlined in *Smith v. Doe*,²⁸⁵ where the Court articulated a seven-part standard for assessing when a civil law is punitive and violates the Ex Post Facto Clause.²⁸⁶ According to the Federal Circuit, the *Smith* test is “exacting and difficult to satisfy.”²⁸⁷

279. *Id.* at 1207.

280. *Id.* at 1200 (alteration in original) (quoting U.S. CONST. art. I, § 9, cl. 3).

281. *Id.* (alteration in original).

282. *Id.* at 1202.

283. *Id.*

284. *Id.*

285. 538 U.S. 84 (2003).

286. *Guangdong Wireking*, 745 F.3d. at 1202–03.

287. *Id.* at 1203. The seven factors are whether the action (1) has traditionally been considered a punishment, (2) “imposes an affirmative disability or restraint,” (3) promotes the goals of punishment, (4) is rationally connected to a non-penal purpose, (5) is excessive compared to its purpose, (6) requires a finding of scienter for application, and (7) applies to criminal actions. *Id.* at 1204 (quoting *Smith*, 538 U.S. at 97, 105) (internal quotations omitted).

After applying the *Smith* test, the Federal Circuit concluded that the NME Amendment did not violate the Ex Post Facto Clause, reasoning that “Wireking has not shown, let alone by the clearest proof, that the absence of a retrospective double-counting provision negates the law’s predominantly remedial impact.”²⁸⁸ Consequently, the Federal Circuit held that the NME Amendment was not penal and did not violate the Ex Post Facto Clause.²⁸⁹

2. *Opinions pertaining to the use of adverse inferences for non-cooperation in AD/CVD investigations*

a. *Mukand, Ltd. v. United States*

In *Mukand, Ltd. v. United States*,²⁹⁰ Mukand, Ltd., an importer of stainless steel from India, appealed a decision of the Trade Court²⁹¹ approving Commerce’s application of adverse facts available (“AFA”) against Mukand in connection with a review of an outstanding AD order.²⁹² In March of 2010, and pursuant to 19 U.S.C. § 1675(a), Commerce initiated an administrative review of an existing AD order involving stainless steel imports from India.²⁹³ As part of that investigation, Commerce issued investigatory questionnaires seeking certain information related to, *inter alia*, the production costs associated with producing stainless steel bar to calculate the antidumping margin applicable to Mukand.²⁹⁴

In Mukand’s responses to the questionnaires, Commerce noted certain discrepancies and informed Mukand that Commerce did not find Mukand’s methodologies to be reasonable.²⁹⁵ In the alternative, Commerce requested that Mukand explain its methodologies and reasons.²⁹⁶ Although Mukand responded to this request and provided Commerce with supplemental information, Commerce remained unsatisfied with Mukand’s responses.²⁹⁷ Finally, Commerce “warned [Mukand] that [f]ailure to provide the requested

288. *Id.* at 1207.

289. *Id.*

290. 767 F.3d 1300 (Fed. Cir. 2014).

291. *Mukand, Ltd. v. United States*, No. 11-00401, 2013 WL 1339399 (Ct. Int’l Trade Mar. 25, 2013), *aff’d*, 767 F.3d 1300 (Fed. Cir. 2014).

292. *Mukand, Ltd.*, 767 F.3d at 1302, 1308.

293. *Id.* at 1302.

294. *Id.* at 1302–03.

295. *See id.* at 1303 (noting that Commerce asked Mukand to provide size-specific cost details).

296. *Id.*

297. *Id.*

information may result in [Commerce] deciding to rely on facts available, as required by section 776(a) of the Tariff Act of 1930, as amended, in [Commerce's] preliminary results."²⁹⁸ Mukand responded as it had before and "conclud[ed] that there is no reasonable and verifiable way to do what is requested."²⁹⁹

Concluding that Mukand's responses to its requests were deficient, Commerce determined Mukand's antidumping duty rate by using other facts available to it.³⁰⁰ As the Federal Circuit notes:

In its preliminary results, Commerce applied an adverse inference against Mukand after concluding that Mukand (i) repeatedly failed to provide product-specific cost data by size; (ii) failed to provide a meaningful explanation of why it could not provide such data; and (iii) failed to provide factual information supporting its claim that product size did not significantly affect production cost. Commerce noted that requesting product-specific cost data is standard procedure, and that a respondent has a duty to provide a full explanation and suggested alternative forms if it is unable to provide requested information. Accordingly, Commerce concluded that applying AFA against Mukand was justified.³⁰¹

Ultimately, Commerce applied an *ad valorem* AFA rate of 21.02% to Mukand's imports, and Mukand filed an appeal with the Trade Court.³⁰²

Noting that Commerce repeatedly asked Mukand to provide specific information and to explain the methodology used in Mukand's responses, the Trade Court affirmed the imposition of the AFA rate by Commerce and rejected Mukand's argument that, in the alternative, Commerce should have applied a partial AFA rate.³⁰³ Mukand then appealed to the Federal Circuit, which affirmed the decision of the Trade Court upholding the application of the AFA rate imposed by Commerce.³⁰⁴

To begin with, the Federal Circuit "review[s] decisions of the Trade Court de novo and appl[ies] anew the same standard used by the Trade Court."³⁰⁵ With respect to the antidumping determinations made by Commerce, the Federal Circuit stated that

298. *Id.* (second alteration in original) (internal quotation mark omitted).

299. *Id.*, at 1303–04 (internal quotation mark omitted).

300. *Id.* at 1304 (citing 19 U.S.C. §§ 1677e(b), 1677m(d)–(e) (2012)).

301. *Id.* (footnote omitted) (internal quotation marks omitted).

302. *Id.* at 1304–05.

303. *Id.*

304. *Id.* at 1308.

305. *Id.* at 1305–06.

Commerce's antidumping determinations are reviewed for substantial evidence. Substantial evidence is defined as "more than a mere scintilla," as well as evidence that a "reasonable mind might accept as adequate to support a conclusion." Our review is limited to the record before Commerce in the particular review proceeding at issue and includes all evidence that supports or detracts from Commerce's conclusion. An agency finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence.³⁰⁶

With respect to Commerce's decision to impose an AFA rate upon an importer by relying on other facts available to it, the Federal Circuit stated that

Commerce may further rely on an adverse inference against a respondent when selecting among the facts otherwise available if it concludes that the respondent failed to cooperate to the best of its ability. The "best of its ability" standard requires the respondent to put forth its maximum effort to investigate and obtain full and complete answers to Commerce's inquiries.³⁰⁷

Applying this standard, the Federal Circuit affirmed Commerce's decision to "resort to facts otherwise available and to apply an adverse inference against Mukand," noting that substantial evidence existed to support the conclusion that Mukand failed to provide the information requested by Commerce.³⁰⁸ Further, the Federal Circuit noted that "Commerce's decision to adopt an adverse inference against Mukand [was] also supported by substantial evidence[, because] Commerce reasonably concluded that Mukand failed to cooperate to the best of its ability when responding to Commerce's requests for information."³⁰⁹ Consequently, substantial evidence existed to support Commerce's imposition of a total AFA rate, rather than a partial AFA rate, against Mukand.³¹⁰

b. Peer Bearing Co.-Changshan v. United States

Like *Mukand*, in *Peer Bearing Co.-Changshan v. United States (Peer III)*,³¹¹ Commerce applied an adverse inference when an importer

306. *Id.* at 1306 (footnotes omitted) (citation omitted).

307. *Id.* (citing 19 U.S.C. § 1677e(b) (2012)).

308. *Id.*

309. *Id.*

310. *Id.* at 1307.

311. 766 F.3d 1396 (Fed. Cir. 2014). *Peer Bearing* is the latest in a line of cases dating back to 2007, when Commerce initiated "the twentieth administrative review of the antidumping duty order on tapered roller bearings and parts thereof, finished and unfinished ('TRBs'), from the People's Republic of China ('PRC'), covering the

failed to act to the best of its ability in complying with a request for information in connection with an administrative review of an antidumping order.³¹² Commerce initiated an administrative review of an AD order pertaining to tapered roller bearings imported by Peer Bearing Company-Changshan (“CPZ”).³¹³ In connection with this review, Commerce issued investigative questionnaires to CPZ “to identify whether its sales of bearings qualified either as export price (EP) sales or as constructed export price (CEP) sales,”³¹⁴ which Commerce uses to determine the price to be used when it calculates the antidumping margin with respect to the bearings.³¹⁵ In response to the questionnaires, CPZ provided CEP sales data for the bearings but did not provide any EP sales data.³¹⁶

The Timken Company (“Timken”), a domestic bearing producer, requested that Commerce require CPZ to provide the EP sales data, but Commerce chose to calculate CPZ’s antidumping margin using the CEP sales data.³¹⁷ However, Commerce later changed course and calculated CPZ’s antidumping margin using the EP sales data.³¹⁸ Because CPZ had only provided Commerce with CEP sales data, the EP sales data was necessarily limited.³¹⁹ Ultimately, Commerce

period June 1, 2006, through May 31, 2007.” Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 73 Fed. Reg. 41,033, 41,033 (July 17, 2008). The related cases include *Peer Bearing Co.-Changshan v. United States*, No. 09-00052, 2013 WL 4615134 (Ct. Int’l Trade Aug. 30, 2013) (*Peer III*), *vacated*, 766 F.3d 1396 (Fed. Cir. 2014); *Peer Bearing Co.-Changshan v. United States*, 853 F. Supp. 2d 1365 (Ct. Int’l Trade 2012) (*Peer II*); *Peer Bearing Co.-Changshan v. United States*, 752 F. Supp. 2d 1353 (Ct. Int’l Trade 2011) (*Peer I*); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 3987 (Jan. 22, 2009).

312. *Peer III*, 766 F.3d at 1397–99.

313. *Id.* at 1397.

314. As the *Peer Bearing* court explained, “[i]f CPZ’s sales are properly classified as EP sales, Commerce uses data reflecting the price of CPZ’s sales to its unaffiliated U.S. importer If CPZ’s sales are properly classified as CEP sales, Commerce uses data reflecting the price of Peer’s sales to its U.S. customers.” *Id.* at 1397–98 (emphasis added); see 19 U.S.C. § 1677a(a)–(b) (2012) (defining export price and constructed export price, respectively).

315. *Peer III*, 766 F.3d at 1397–98.

316. *Id.* at 1398. Specifically, as the Federal Circuit noted, “CPZ responded that its sales were properly classified as CEP sales and provided Commerce with the CEP data for its bearing sales. It did not provide the corresponding EP data.” *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

determined that the appropriate antidumping margin, based on the limited subset of EP sales data, was 92.84%.³²⁰ Subsequently, the Trade Court overturned the EP-based antidumping margin imposed on CPZ, held that the methods used by Commerce were contrary to law, and remanded the matter back to Commerce.³²¹

On remand, Commerce requested that CPZ provide the EP sales data that Commerce would use to calculate the antidumping margin to be applied to CPZ.³²² However, during the course of the administrative review of the applicable AD order, CPZ had been sold, and CPZ was unable to produce the EP sales data.³²³ Nonetheless, Commerce determined that CPZ was responsible for maintaining access to the EP data during the course of the entire proceeding because the need for the EP sales data had been raised on the record during the proceedings below.³²⁴ Accordingly, Commerce concluded that CPZ failed to cooperate to the best of its ability, assessed the antidumping margin applicable to CPZ by using AFA, and imposed an AFA antidumping margin of 60.95% against CPZ.³²⁵

The Trade Court reviewed the matter again on appeal and ruled against Commerce.³²⁶ This time, the Trade Court held that Commerce erroneously applied AFA based on CPZ's failure to "maintain access to the EP data" because Commerce's expectations regarding CPZ's obligation to maintain access to data were unreasonable.³²⁷ For this reason, concluded the Trade Court, the statutory requirements giving rise to the use by Commerce of AFA were not satisfied, and the Trade Court again remanded the case back to Commerce.³²⁸

Commerce, on this second remand, again concluded that the antidumping margin for CPZ should be calculated on the basis of the EP sales data, which, as noted above, was limited, since CPZ had only

320. *Id.*

321. *Id.* (citing *Peer Bearing Co.-Changshan v. United States (Peer I)*, 752 F. Supp. 2d 1353, 1360–64 (Ct. Int'l Trade 2011)).

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.* at 1398–99 (citing 19 U.S.C. § 1677e(b) (2012)).

326. *Id.* at 1399 (citing *Peer Bearing Co.-Changshan v. United States (Peer II)*, 853 F. Supp. 2d 1365, 1373 (Ct. Int'l Trade 2012)).

327. *Id.*

328. *Id.* The Trade Court "held that 19 U.S.C. § 1677e(b), which allows for the application of adverse facts available if a party fails to act 'to the best of its ability to comply with a request for information,' does not apply to requests that the party has yet to receive." *Id.* (quoting *Peer II*, 853 F. Supp. 2d, at 1374).

provided Commerce with CEP sales data without EP sales data.³²⁹ Hence, Commerce determined that CPZ's antidumping margin should be 6.52% based on the CEP sales data provided to Commerce, which the Trade Court upheld.³³⁰ Timken then filed the instant appeal with the Federal Circuit.³³¹

On appeal, the Federal Circuit vacated the Trade Court's decision in *Peer III* and remanded, instructing the Trade Court to "reinstatement Commerce's application of the adverse facts available and its calculation of CPZ's margin" at the 60.95% rate.³³² Again, the Federal Circuit reviews a Trade Court decision "evaluating an antidumping determination by Commerce by reapplying the statutory standard of review that the [Trade Court] applied in reviewing the administrative record."³³³ Further, the Federal Circuit will "uphold Commerce's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with the law."³³⁴

In reversing the Trade Court, the Federal Circuit cited 19 U.S.C. § 1677e(b) for the proposition that "Commerce may 'use an inference that is adverse to the interests of [a] party' (i.e., apply adverse facts available against the party) when it determines that the party 'has failed to cooperate by not acting to the best of its ability to comply with a request for information.'"³³⁵ In construing the "best of its ability" provision in § 1677e(b), the Federal Circuit noted that it has "[previously] held that the 'best of its ability' provision 'requires that importers . . . take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce.'"³³⁶ Further, the Federal Circuit noted that it has also previously held that "the information an importer must maintain [under the best of its ability provision] can include information requested for the first time on remand."³³⁷

329. *Id.*

330. *Id.* (citing *Peer Bearing Co.-Changshan v. United States (Peer III)*, No. 09-00052, 2013 WL 4615134 (Ct. Int'l Trade, Aug. 30, 2013), *vacated*, 766 F.3d 1396 (Fed. Cir. 2014)).

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* (alteration in original) (quoting 19 U.S.C. § 1677e(b)).

336. *Id.* at 1399-1400 (second alteration in original) (quoting *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003)).

337. *Id.* at 1400.

Accordingly, the Federal Circuit concluded that substantial evidence supported the conclusion that “CPZ did not act to the best of its ability to comply with Commerce’s request, even though that request came for the first time on remand,” and that “CPZ failed to cooperate to the best of its ability by not maintaining access to the EP data throughout the course of the proceeding.”³³⁸ With respect to the § 16773(b) “best of its ability” provision, the Federal Circuit further held that “Commerce has established that a reasonable importer would have been on notice that EP data was relevant to the proceeding and may be requested by Commerce,” and therefore, “under these circumstances, where the importer knew there was a dispute over whether to use EP or CEP data, a reasonable importer would know that it needed to maintain both.”³³⁹ Consequently, ruled the Federal Circuit, “[f]ailure to maintain access to [this] data may . . . result in a determination that the importer has failed to act to the best of its ability in responding to a request for the data and an application of adverse facts available against the importer.”³⁴⁰

c. Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States

*Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*³⁴¹ also involved a lawsuit challenging Commerce’s application of an adverse inference in connection with the administrative review of an existing AD order.³⁴² In 2009, pursuant to a request from Mueller Comercial de Mexico, S. de R.L. de C.V. and a related subsidiary (“Mueller”), Commerce initiated a review of a 1992 AD order “on certain circular welded non-alloy steel pipe from Mexico” and issued investigative questionnaires to Muller, Tuberia Nacional, S.A. de C.V. (“TUNA”), Ternium Mexico, S.A. de C.V. (“Ternium”), and others.³⁴³

Ultimately, Commerce decided that it needed to calculate Mueller’s antidumping margin. As the Federal Circuit noted, “[f]or Commerce to calculate Mueller’s antidumping rate, it was required to determine the difference between the ‘normal value’ of Mueller’s goods (typically ‘home market’ price) and the ‘export price’ at which Mueller’s goods were sold in the United States.”³⁴⁴ Although Mueller had a sufficient amount of data regarding the home market price of

338. *Id.*

339. *Id.* at 1400–01.

340. *Id.* at 1401.

341. 753 F.3d 1227 (Fed. Cir. 2014).

342. *Id.* at 1229.

343. *Id.*

344. *Id.*

Mueller's goods, in order to calculate its antidumping margin, Commerce requested additional information, including production cost information.³⁴⁵ Despite fully cooperating with Commerce, Mueller lacked access to all of the production cost information, and Commerce requested this information from Mueller's suppliers, Ternium and TUNA.³⁴⁶

Although TUNA also fully cooperated with respect to the requests for production cost information issued by Commerce, Ternium failed to provide Commerce with the requested information, thereby preventing Commerce from having all of the data it needed in order to calculate Mueller's antidumping margin.³⁴⁷ Consequently, Commerce calculated Mueller's antidumping margin using "facts otherwise available" under 19 U.S.C. § 1677e.³⁴⁸ The Federal Circuit stated that

[s]pecifically, Commerce concluded that the production costs of the goods Mueller acquired from Ternium (data that was unavailable) were related to acquisition costs (data that was available). Commerce identified the three sales transactions between TUNA and Mueller made at the greatest discount to Mueller—where Mueller's acquisition cost was the furthest below TUNA's production cost. Commerce then inferred that all of Ternium's pipe that was sold to Mueller involved this discount for acquisition cost. This enabled Commerce to calculate Ternium's cost of production from Mueller's cost of acquisition from Ternium. Although there were other sales transactions between TUNA and Mueller that were not discounted as significantly, Commerce chose not to use that data. In its Final Results, Commerce used data from the three transactions to calculate a new weighted-average dumping rate for Mueller of 19.81 [%].³⁴⁹

Mueller then filed an action in the Trade Court to appeal the antidumping margin imposed by Commerce. In its Trade Court appeal, Mueller argued that "Commerce's application of Ternium's AFA to its calculation of the margin for Mueller, despite Mueller's full cooperation with Commerce's requests, was improper" and that "Commerce should have calculated production costs using the entire TUNA data set" or at least used some of information from

345. *Id.* at 1229–30.

346. *Id.* at 1230.

347. *Id.*

348. *Id.* (quoting 19 U.S.C. § 1677e(a) (2012)) (internal quotation marks omitted).

349. *Id.*

Ternium.³⁵⁰ Finding Commerce's application of other facts available to calculate Mueller's antidumping margin to be reasonable, the Trade Court affirmed, and Mueller appealed.³⁵¹

On appeal, the Federal Circuit vacated the decision of the Trade Court and remanded the case so that Commerce could re-calculate "an accurate [antidumping margin] rate for Mueller."³⁵² In reaching this conclusion, the Federal Circuit considered two different methods that Commerce might use to supply missing information: the "facts otherwise available" approach³⁵³ and the "adverse facts available" approach.³⁵⁴ The Federal Circuit explained that the "facts otherwise available" approach "may be used whether or not any party has failed to cooperate fully with the agency in its inquiry"³⁵⁵ but that the "adverse facts available" approach may only be used "when 'Commerce makes the separate determination that [the party] has failed to cooperate by not acting to the best of its ability.'"³⁵⁶

The Federal Circuit then went on to consider the data used by Commerce in calculating Mueller's antidumping margin and the two rationales used by Commerce to support its data selection, noting that "[i]f one [of the rationales] fails, as we conclude it does, Commerce's ruling cannot stand."³⁵⁷ Specifically, the Federal Circuit rejected Commerce's argument that using an adverse inference to assess Ternium's production costs resulted in "the most accurate calculation of Mueller's antidumping rate" because "Commerce's accuracy rationale for its calculation of Mueller's antidumping rate was unsupported by substantial evidence."³⁵⁸ However, because the

350. *Id.* at 1230–31 & n.3 (internal quotation marks omitted).

351. *Id.* at 1231.

352. *Id.* at 1235.

353. *Id.* at 1231 (quoting 19 U.S.C. § 1677e(a)). Under § 1677e(a), if a party impedes an AD/CVD investigation or proceeding and/or provides unverifiable information, withholds information, or fails to produce certain information, Commerce may "use the facts otherwise available" to it, including facts unfavorable to that party, "in reaching the applicable determination" in that proceeding.

354. *Mueller Comercial de Mex., S. de R.L. de C.V.*, 753 F.3d at 1231–32 (quoting 19 U.S.C. § 1677e(b)). Under § 1677e(b), Commerce, "in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available" if a party fails to properly cooperate with Commerce during an AD/CVD proceeding.

355. *Mueller Comercial de Mex., S. de R.L. de C.V.*, 753 F.3d 1232 (citing 19 U.S.C. § 1677e(a); *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1346 (Fed. Cir. 2011)).

356. *Id.* (alteration in original) (quoting 19 U.S.C. § 1677e(b)).

357. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947)).

358. *Id.* at 1233.

other rationale passed muster, the Federal Circuit remanded the matter for Commerce to calculate “an accurate rate for Mueller.”³⁵⁹

d. Fine Furniture (Shanghai) Ltd. v. United States

In *Fine Furniture (Shanghai) Ltd. v. United States*,³⁶⁰ the Federal Circuit reviewed the application of adverse inferences in connection with a CVD-related investigation.³⁶¹ In this case, Commerce initiated a CVD investigation with respect to the production of multilayered wood flooring in China.³⁶² In connection with this CVD investigation, Fine Furniture (Shanghai) Ltd. (“Fine Furniture”) was designated a “mandatory respondent” by Commerce, and Commerce designated the People’s Republic of China as the foreign government respondent in this investigation.³⁶³ Although Fine Furniture fully cooperated in the investigation, China failed to provide certain information requested by Commerce.³⁶⁴ Consequently, Commerce relied on adverse inferences to determine that the Chinese government’s provision of electricity qualified as a specific financial contribution and to select the benchmark for determining the existence and amount of benefit a company would receive as the result of this contribution.³⁶⁵

The Trade Court ruled that Commerce was correct in turning to adverse inferences to fill in the gaps for missing information the Chinese government controlled and failed to provide.³⁶⁶ Fine Furniture appealed and, in so doing, “alleg[ed] that Commerce improperly used adverse inferences against Fine Furniture, a cooperating party, in calculating the CVD rate.”³⁶⁷ On appeal, the Federal Circuit affirmed the judgment of the Trade Court, concluding that Commerce acted appropriately by applying adverse inferences to assess the CVD rate.³⁶⁸

In reaching this conclusion, the Federal Circuit recognized that Commerce routinely requests information from foreign governments

359. *See id.* at 1233, 1235 (finding a sufficient policy consideration when Mueller failed to induce Ternium’s cooperation and thereby allowed Ternium to continually evade its antidumping requirements).

360. 748 F.3d 1365 (Fed. Cir. 2014).

361. *Id.* at 1367.

362. *Id.*

363. *Id.*

364. *Id.* at 1367–68.

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.* at 1368.

that it suspects offer subsidies in order to calculate the amount of CVD to be imposed on the import of merchandise.³⁶⁹ However, when Commerce lacks the information necessary to calculate the rate of the CVD, Commerce may use “facts otherwise available” and may also “apply an adverse inference in selecting from among the facts otherwise available when an interested party fails to cooperate by not acting to the best of its ability to comply with a request for information.”³⁷⁰

The Federal Circuit held that, in connection with calculating the CVD rate applicable to Fine Furniture, Commerce properly applied an adverse inference in selecting from the facts otherwise available to it.³⁷¹ In support of this decision, the Federal Circuit stated, in relevant part, that

[b]ecause the government of China refused to provide information as to how the electricity process and costs varied among the various provinces that supplied electricity to industries within their areas, Commerce relied on an adverse inference to determine that Fine Furniture received a countervailable subsidy. Commerce also noted that the government of China did not provide the data sufficient to establish the benchmark price for electricity, leading Commerce to apply an adverse inference by choosing the highest applicable electricity rates for the user categories reported by the mandatory respondents to calculate the benchmark. This selection is made under the assumption that this price is the least likely to be subsidized and is consistent with what Commerce has done in other administrative determinations in which the government of China refused to respond to portions of Commerce’s questionnaires.³⁷²

Finally, as the Federal Circuit noted, “[a]lthough it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce’s questions, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court’s precedent.”³⁷³

3. *Other notable AD/CVD decisions*

a. Wind Tower Trade Coalition v. United States

In *Wind Tower Trade Coalition v. United States*,³⁷⁴ the Federal Circuit reviewed a decision of the Trade Court denying motions for

369. *Id.* at 1369–70.

370. *Id.* at 1370 (citing 19 U.S.C. § 1677e(a)–(b) (2012)).

371. *Id.* at 1372.

372. *Id.* (citations omitted).

373. *Id.* at 1373.

374. 741 F.3d 89 (Fed. Cir. 2014).

injunctive relief brought by Wind Tower Trade Coalition (“Wind Tower”) to prevent the liquidation, and, therefore, the entry into the United States, of utility wind towers.³⁷⁵ The Trade Court initially issued temporary restraining orders preventing the liquidation and entry of the wind towers while the parties presented arguments as to whether the court should issue a permanent injunction.³⁷⁶

However, after reviewing the submissions, the Trade Court denied the request for injunctions, finding that Wind Tower had not demonstrated that it would likely prevail on the merits, and Wind Tower appealed.³⁷⁷ Ultimately, the Federal Circuit affirmed the decision of the Trade Court, holding that Wind Tower would likely not prevail on the merits because the USITC voting pattern did not conclusively show that the industry would be harmed, a condition precedent to a finding that an AD or CVD order should be issued.³⁷⁸

b. Fedmet Resources Corp. v. United States

In *Fedmet Resources Corp. v. United States*,³⁷⁹ the Federal Circuit heard an appeal brought by the importer (“Fedmet”), regarding the scope of an existing AD and CVD order pertaining to certain magnesia carbon bricks (“MCBs”) imported from Mexico and China (the “Order”).³⁸⁰ In this case, Fedmet asked Commerce to clarify the scope of the Order. Specifically, it requested that Commerce determine that “[Fedmet’s] Bastion® line of magnesia carbon alumina (‘MAC’) bricks was outside the scope of the outstanding [Order]”³⁸¹ In its scope request, Fedmet argued that its MAC bricks should not be subject to the Order because the MAC bricks contain different levels and amounts of magnesia, alumina, carbon, and other elements that are typically present in MCB, which in turn, cause MAC bricks to perform differently from MCBs.³⁸²

375. *Id.* at 92–94.

376. *Id.* at 94.

377. *Id.*

378. *Id.* at 97–101 (reasoning that Commerce’s interpretation of the AD/CVD statutes was entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), because Congress did not directly speak to the voting pattern at issue and the agency’s interpretation was reasonable).

379. 755 F.3d 912 (Fed. Cir. 2014).

380. *Id.* at 913–14. MCBs are refractory bricks (fire bricks) lining ladles and furnaces in the steelmaking and steel handling processes to withstand high heat and to promote energy efficiency. *Id.* at 914.

381. *Id.* at 916 (footnote omitted).

382. *Id.* at 916–17.

After conducting an investigation and reviewing information and materials provided by interested parties, Commerce initially ruled that Fedmet's MAC bricks did, indeed, fall within the ambit of the Order.³⁸³ In making this preliminary determination, "Commerce first found that the plain language of [the Order] was ambiguous regarding whether 'MCBs with alumina' were covered," and in order to resolve the ambiguity, "turned to the extrinsic information obtained from interested parties and [to] its own research during the scope proceedings."³⁸⁴ In so doing, "Commerce gave 'the greatest weight' to the fact that Fedmet's MAC bricks 'fall squarely' within the levels of magnesia and carbon provided in the orders."³⁸⁵ Given that "Commerce also found that Fedmet's MAC bricks have the same characteristics and uses as MCBs, and are marketed and sold in the same way and through similar channels as MCBs," Commerce ultimately concluded that Fedmet's MAC bricks were within the scope of the Order.³⁸⁶

Subsequently, Fedmet brought an action in the Trade Court to challenge the scope ruling issued by Commerce, and the Trade Court affirmed.³⁸⁷ The Trade Court agreed with Commerce that the record evidence revealed that the Order was ambiguous as to whether it covered "MCBs with alumina," and relied upon other evidence, also obtained by Commerce during its investigation and appearing in the record, to support the conclusion that the Order covered MAC bricks.³⁸⁸ Fedmet appealed, arguing that, contrary to the conclusions reached by the Trade Court and Commerce, the Order was clear and unambiguous as to which type of refractive bricks clearly fell within its scope (e.g., MCBs) and which were outside of its reach (i.e., MACs).³⁸⁹

The Federal Circuit reversed, holding that both the Trade Court and Commerce erred in concluding that the Order was ambiguous and, therefore, applied to both MACs and MCBs.³⁹⁰ In reversing, the Federal Circuit held that the plain language of the Order, which adopted nearly verbatim the proposed scope language of the AD and CVD investigations underlying the Order, applied only to MCBs

383. *Id.* at 917.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* at 917–18 (internal quotation marks omitted).

389. *Id.* at 918–19.

390. *Id.* at 922–23 (reasoning that Commerce's decision was not supported by substantial evidence).

and clearly excluded Fedmet's MAC bricks.³⁹¹ In its analysis, the Federal Circuit noted that, "[t]he plain language of a countervailing or antidumping order is 'paramount' in determining whether particular products are included within its scope."³⁹² In order to determine whether a particular product is covered by the plain language of an AD or CVD order (i.e., within the scope of the order), "Commerce *must* consider '[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the [USITC]."³⁹³ If these sources, referred to as (k)(1) sources, are not dispositive, Commerce may proceed to an evaluation of other information, including information appearing in 19 C.F.R. § 351.225(k)(2).³⁹⁴

After evaluating information from the (k)(1) sources supporting the Order, the Federal Circuit concluded that "[t]he (k)(1) sources are dispositive and unequivocally confirm that Fedmet's MAC bricks are not within the scope of the orders."³⁹⁵ The Federal Circuit noted that the (k)(1) sources contained multiple indications from one of the interested parties that MAC bricks have different physical properties and perform differently than MCBs, that MCBs and MAC bricks are priced differently, and that "MCBs and MAC bricks are 'not generally substitutable'" for each other.³⁹⁶ Further, the Federal Circuit noted that "the (k)(1) sources confirm Commerce and the [USITC's] understanding that the underlying investigations did not extend to MAC bricks."³⁹⁷ Although it concluded that "the question before this Court was asked and answered during the underlying investigations," the Federal Circuit went on to re-emphasize that "the (k)(1) sources are afforded primacy in the scope analysis . . . because

391. *Id.* at 919–20.

392. *Id.* at 918 (quoting *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012)).

393. *Id.* (emphasis added) (citing 19 C.F.R. § 351.225(k)(1) (2014)). The court denotes the sources of information listed in 19 C.F.R. § 351.225(k)(1) as "the (k)(1) sources." *Id.*

394. *Id.* (citing 19 C.F.R. § 351.225(k)(2)). The court denotes the criteria described in § 351.225(k)(2) as the "(k)(2) criteria." *Id.* These criteria include the characteristics of a product, how said product is to be used, marketed and/or sold, the expectations of those who will use the product, and so on. 19 C.F.R. § 352.225(k)(2)(i)–(v).

395. *Id.* at 919.

396. *Id.*

397. *Id.*

interpretation of the language used in the orders *must be based on the meaning given to that language during the underlying investigations.*”³⁹⁸

c. Michaels Stores, Inc. v. United States

*Michaels Stores, Inc. v. United States*³⁹⁹ involved an appeal by Michaels Stores, Inc. (“Michaels”) challenging the customs duty rates imposed by Commerce upon certain pencils imported by Michaels from the People’s Republic of China.⁴⁰⁰ Commerce imposed AD orders levying a 114.90% country-wide *ad valorem* duty on the pencils, but allowed certain Chinese producers to import the subject pencils under a lower producer rate pending administrative review of the producers to show that they were not subject to state control.⁴⁰¹ For certain producers, the rates were 26.32% and 10.41% (for producer China First), 2.66% (for producer Three Star), and 11.48% and 3.55% (for producer Rongxin).⁴⁰²

When Michaels imported the pencils from these producers, it made cash deposits with CBP to cover anticipated AD-related customs duties in amounts reflecting the producer rates but not at the 114.90% *ad valorem* rate.⁴⁰³ Subsequently, CBP issued bills to Michaels for the difference, and Michaels protested.⁴⁰⁴ In its protest, Michaels challenged the additional amounts due claimed by CBP, asserting that it should only have to pay the producer rates and not the full *ad valorem* rate.⁴⁰⁵ However, CBP rejected Michaels’s protest.⁴⁰⁶

Michaels then brought an action in the Trade Court, again arguing that it should only have to pay the producer rates and not the full *ad valorem* rate.⁴⁰⁷ The Trade Court affirmed the determination of the CBP, and Michaels appealed to the Federal Circuit.⁴⁰⁸ On appeal, the Federal Circuit affirmed the decision of the Trade Court, holding

398. *Id.* at 920–21 (emphasis added).

399. 766 F.3d 1388 (Fed. Cir. 2014).

400. *Id.* at 1389.

401. *Id.* at 1390–91.

402. *Id.*

403. *Id.* at 1391.

404. *Id.*

405. *Id.* Michaels based its argument on 19 C.F.R. § 351.107(b)(2), which provides that “if the Secretary has not established previously a combination cash deposit rate . . . for the exporter and producer in question or a noncombination rate for the exporter in question, the Secretary will apply the cash deposit rate established for the producer.” *Id.* (quoting 19 C.F.R. § 351.107(b)(2) (2014)).

406. *Id.*

407. *Id.*

408. *Id.*

that the producer rates issued under Commerce's regulations constituted a permissible interpretation of the AD statute provisions.⁴⁰⁹

IV. FEDERAL CIRCUIT REVIEW OF SECTION 337 INVESTIGATIONS AND RELATED MATTERS BEFORE THE U.S. INTERNATIONAL TRADE COMMISSION

A. *Judicial Review of Section 337 Investigations*

Unlike the Commission's AD- and CVD-related proceedings, which are first reviewed by the Trade Court and then appealed to the Federal Circuit, the Federal Circuit has exclusive jurisdiction for appeals of the interlocutory and final determinations of the Commission with respect to section 337 investigations and related proceedings.⁴¹⁰ In 2014, the Federal Circuit only published four opinions with respect to the section 337 investigations conducted by the Commission.⁴¹¹ In two of these cases, the Federal Circuit reversed, in part or in whole, and remanded to the Commission for further proceedings.⁴¹² In the remaining two cases, the Federal Circuit affirmed the decision below in one⁴¹³ and denied the relief sought in the other.⁴¹⁴

Of the four section 337 opinions published by the Federal Circuit in 2014, two cases involved the construction and scope of consent orders between U.S. companies and foreign importers where the foreign importers imported or attempted to import merchandise that infringed upon each of the U.S. companies' respective patents.⁴¹⁵ The other two cases involved section 337 investigations wherein the

409. *Id.* at 1389, 1393. *See generally* 19 U.S.C. § 1673e(a)(3) (1994) (requiring estimated AD duties to be deposited at the same time as estimated normal customs duties are deposited).

410. *See* 28 U.S.C. § 1292(c)(1) (2012) (appeals of interlocutory decisions); *id.* § 1295(a)(6) (final determinations).

411. Section 337 addresses unfair practices in import trade. 19 U.S.C. § 1337 (2004). Under § 1337(c), any person adversely affected by the Commission's final determination regarding unfair import practices may appeal to the Federal Circuit. *Id.*

412. *UPI Semiconductor Corp. v. Int'l Trade Comm'n*, 767 F.3d 1372 (Fed. Cir. 2014); *Align Tech., Inc. v. Int'l Trade Comm'n*, 771 F.3d 1317 (Fed. Cir. 2014).

413. *X2Y Attenuators, LLC v. Int'l Trade Comm'n*, 757 F.3d 1358 (Fed. Cir. 2014).

414. *See In re Nokia Inc.*, 760 F.3d 1348 (Fed. Cir. 2014) (per curiam) (denying a petition for a writ of mandamus).

415. *See UPI Semiconductor Corp.*, 767 F.3d at 1375 (quoting the contents of the consent order at issue and explaining that the Administrative Law Judge entered it mostly as drafted by the respondent, a technology company); *Align Tech., Inc.*, 771 F.3d at 1318–19 (concerning allegations that a developer of aligners to treat teeth misalignment imported products that infringed a competitor company's intellectual property).

Commission concluded that no infringing use had occurred.⁴¹⁶ One of those cases involved a relatively straightforward construction of the complainant's patents, which resulted in a clear disavowal of claim scope, thereby precluding a finding of a violation of section 337.⁴¹⁷ The other case came to the Federal Circuit by way of a petition for writ of mandamus, wherein the complaining U.S. company sought to compel the Commission to re-evaluate the petitioner's non-infringement contention.⁴¹⁸

B. USITC Section 337 Investigations Reviewed by the Federal Circuit in 2014

I. UPI Semiconductor Corp. v. U.S. International Trade Commission

In *UPI Semiconductor v. U.S. International Trade Commission*,⁴¹⁹ the Federal Circuit reviewed a decision by the USITC that uPI Semiconductor Corp. ("uPI"), the respondent-intervenor in a section 337 patent infringement case, violated various provisions of a Consent Order between uPI and Richtek Technology Corp. and Richtek USA, Inc. (collectively, "Richtek").⁴²⁰ In 2010, Richtek filed a section 337 complaint with the USITC, alleging that uPI infringed upon several of Richtek's U.S. patents and other trade secrets with respect to certain direct current to direct current (DC-DC) voltage controllers and that the import and sale by uPI of said controllers violated section 337.⁴²¹

Prior to an evidentiary hearing regarding Richtek's complaint and in an effort to terminate the USITC investigation, uPI moved for the entry of a consent order (drafted by uPI), wherein uPI would agree not to import into the United States any products that contained any components that infringed upon Richtek's patents (the "Consent

416. See *In re Nokia, Inc.*, 760 F.3d at 1348 (deciding, without reaching the merits, that because the petitioners had waived an infringement claim before the Commission); *X2Y Attenuators, LLC*, 757 F.3d at 1363 (finding no section 337 violation where the petitioner, X2Y Attenuators, LLC, conceded that Intel had not infringed any of its patents).

417. See *X2Y Attenuators, LLC*, 757 F.3d at 1362–63 (determining that the standard for finding disavowal had been met by labeling an element "essential" and by stating a particular feature was "universal").

418. See *In re Nokia, Inc.*, 760 F.3d at 1348 (rejecting the petitioners' request to have the court issue a writ of mandamus because the petitioners had not raised an infringement claim below).

419. 767 F.3d 1372 (Fed. Cir. 2014).

420. *Id.* at 1374–75.

421. *Id.*

Order”).⁴²² Although Richtek objected, the USITC administrative law judge (“ALJ”) to whom the case was assigned entered the uPI-drafted Consent Order.⁴²³ About a year later, however, Richtek brought a suit to enforce the Consent Order. In that case, Richtek alleged that uPI violated the Order in two respects: first, with respect to the infringing products that were the subject of Richtek’s initial USITC complaint (the “formerly accused products”), and second, with respect to “[certain] products allegedly developed and produced after entry of the Consent Order (the ‘post-Consent Order products’).”⁴²⁴

In the USITC enforcement proceeding, the ALJ determined that the formerly accused products violated Richtek’s patents and used its trade secrets, but that the post-Consent Order products, which the ALJ considered to be violative of Richtek’s patents, did not use any of Richtek’s trade secrets.⁴²⁵ In so holding, the ALJ fined uPI approximately \$750,000.⁴²⁶ Subsequently, both parties petitioned for full Commission review.⁴²⁷ Upon full Commission review, the USITC held that the formerly accused products—but not the post-Consent Order products—were developed using Richtek’s trade secrets.⁴²⁸ The USITC also affirmed the ALJ’s ruling that the formerly accused products only violated one of Richtek’s patents, but held that none of the other formerly accused products or any of the post-Consent Order products violated Richtek’s patents.⁴²⁹ The full USITC also vacated as moot certain other infringement claims raised by Richtek.⁴³⁰ Because the USITC affirmed some but not all of the ALJ’s holdings, it reduced uPI’s fine to \$620,000, and Richtek appealed to the Federal Circuit.⁴³¹

On appeal, uPI argued that the Consent Order’s aiding and abetting provisions⁴³² could not reach imports of infringing products

422. *Id.* at 1375.

423. *Id.*

424. *Id.* (internal quotation marks omitted).

425. *Id.* at 1375–76.

426. *Id.* at 1376.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.* at 1376–77.

431. *Id.* at 1377.

432. The Consent Order states, in relevant part, that “uPI will not . . . knowingly aid, abet, encourage, participate in, or induce importation into the United States . . . or the sale, offer for sale, or use in the United States after importation, without the consent or agreement of Richtek, any DC-DC controllers or products containing the same which infringe [Richtek’s patents].” *Id.* at 1375.

by third parties because the USITC failed to enter a general exclusion order pursuant to *Kyocera Wireless Corp. v. International Trade Commission*⁴³³ and because the USITC could not show which of uPI's products directly infringed upon any of Richtek's patents or which of uPI's DC-DC controllers sold after the entry of the Consent Order (i.e., were post-Consent Order products) contained any formerly accused products.⁴³⁴ The Federal Circuit rejected uPI's arguments here, holding that "[s]ubstantial evidence supports the Commission's findings that uPI post-Consent Order upstream sales were linked to subsequent downstream United States imports or sales of the formerly accused products and that uPI knowingly aided or abetted United States imports or sales of the formerly accused products."⁴³⁵ The Federal Circuit also rejected uPI's *Kyocera* argument, holding that "[t]he Consent Order prohibits uPI from knowingly aiding or abetting the importation of DC-DC controllers produced using or containing Richtek trade secrets or infringing Richtek patents, or products containing the same."⁴³⁶ Additionally, the Federal Circuit rejected a similar argument raised by uPI with respect to one of Richtek's patents.⁴³⁷

Finally, the Federal Circuit rejected the Commission's conclusion that none of the post-Consent Order products were made using Richtek's trade secrets.⁴³⁸ To the contrary, the Federal Circuit ruled that substantial evidence tended to show that the post-Consent Order products were not independently developed, as claimed by uPI, but

433. 545 F.3d 1340 (Fed. Cir. 2008). In *Kyocera*, the Federal Circuit overturned a limited exclusion order (LEO) issued by the USITC under 19 U.S.C. § 1337(d)(2) against certain infringing products imported by Qualcomm Inc., which was not a respondent to the underlying section 337 investigation. In overturning the LEO, the Federal Circuit held that 19 U.S.C. § 1337(d)(2), which permitted general exclusion orders to be issued to all persons, including section 337 investigation non-respondents, to prevent the entry of infringing products into the United States, only permitted LEOs to be issued against the infringing products of respondents to the underlying section 337 investigation. *Id.* at 1358.

434. *UPI Semiconductor*, 767 F.3d at 1378 (defining general exclusion orders, which, in contrast to limited exclusion orders that only apply to the parties before the Commission, bar anyone from importing the infringing products).

435. *Id.*

436. *Id.* at 1380 (internal quotation marks omitted).

437. *Id.* (affirming the Commission's finding that uPI knowingly aided or abetted the sale of formerly accused products in violation of the Consent Order with respect to U.S. Patent No. 7,315,190 (issued Jan. 1, 2008)).

438. *Id.* at 1381–82 (noting that uPI did not produce any evidence to rebut Richtek's argument that certain markings and other data found in materials used by uPI indicated violations of Richtek's patent).

were produced or developed using Richtek's trade secrets in violation of the Consent Order.⁴³⁹ Consequently, the Federal Circuit remanded the case to the full Commission.⁴⁴⁰

2. *In re Nokia Inc.*

*In re Nokia, Inc.*⁴⁴¹ involved a section 337 case initially reviewed by the Federal Circuit in 2012.⁴⁴² In the 2012 case, the Federal Circuit ruled that the Commission erred in finding that Nokia did not infringe upon certain wireless telephone patents,⁴⁴³ held that the Commission misconstrued certain claim terms in those patents,⁴⁴⁴ and remanded the case for additional proceedings consistent with that opinion.⁴⁴⁵ In the case below, the Federal Circuit stated:

Nokia proposes two alternative grounds to support the Commission's decision. First, Nokia argues that there can be no infringement in this case because the scrambling codes in the Nokia system are not transmitted. Neither the administrative law judge nor the Commission addressed that argument. The agency's decision was not predicated on that rationale, and under well-settled principles of administrative law, we are not free to accept Nokia's invitation to uphold the agency's decision on a ground not ruled on by the agency. *That issue, if Nokia wishes to raise it again before the Commission, may be raised on remand.*⁴⁴⁶

Upon remand, the Federal Circuit noted that "the Commission determined that petitioners had waived any argument that the scrambling codes in their accused systems are not transmitted as required by the patent claims in the underlying investigation."⁴⁴⁷ Subsequently, Nokia filed a petition for writ of mandamus with the

439. *Id.* at 1383.

440. *Id.*

441. 760 F.3d 1348 (Fed. Cir. 2014) (per curiam).

442. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318 (Fed. Cir. 2012), *cert. denied*, *Nokia, Inc. v. Int'l Trade Comm'n*, 134 S. Ct. 469 (2013).

443. *Id.* at 1320 (citing U.S. Patent Nos. 7,190,966 and 7,286,847). Both of these patents, held by affiliated U.S. companies, dealt with the allocation of radio frequency spectrum used in a Code Division Multiple Access ("CDMA") cellular communications system. *Id.* at 1320–21.

444. In this case, the Federal Circuit was asked to decide whether a USITC ALJ used the correct definition of the claim terms "code" and "increased power level," since those terms are used in the patents, when the ALJ undertook to construct the claims set forth in the patents. *Id.* at 1323–24.

445. *Id.* at 1320 (citing U.S. Patent No. 7,190,966 (granted Mar. 13, 2007); U.S. Patent No. 7,286,847 (granted Oct. 23, 2007)).

446. *Id.* at 1328–29 (emphasis added) (citations omitted).

447. *In re Nokia, Inc.*, 760 F.3d at 1348.

Federal Circuit, requesting that the Federal Circuit “compel the Commission to address [Nokia’s] non-infringement argument.”⁴⁴⁸

The Federal Circuit denied Nokia’s petition.⁴⁴⁹ Citing the U.S. Supreme Court’s decision in *Will v. United States*,⁴⁵⁰ where the Court declared that the writ of mandamus is an “extraordinary remedy” that should only be used to require a lower court to exercise its jurisdiction when it has a “duty to do so,”⁴⁵¹ the Federal Circuit stated that “[a]lthough mandamus is an available remedy to enforce compliance with a prior mandate, nothing in our prior decision compelled the Commission to address the petitioners’ non-infringement contention.”⁴⁵² The Federal Circuit held that the language it used concerning remand merely served to identify an issue that Nokia might choose to raise on remand, but that its language certainly “did not suggest, and did not mandate, that the Commission could not consider whether the issue had been preserved for review.”⁴⁵³

3. *Align Technology, Inc. v. U.S. International Trade Commission*

In *Align Technology, Inc. v. U.S. International Trade Commission*,⁴⁵⁴ the Federal Circuit reviewed and overturned a determination by the full Commission that a party to a consent order did not violate the terms of the consent order when it electronically transmitted digital data concerning the subject of the consent order into the United States.⁴⁵⁵ In 2006, Align Technologies, Inc. (“Align”) initiated a section 337 patent infringement complaint against OrthoClear, Inc., OrthoClear Holdings, Inc., and OrthoClear Pakistan Pvt, Ltd. (collectively, “OrthoClear”) alleging infringement of its patents related to the Invisalign System, a product line of dental aligners.⁴⁵⁶ Because each

448. *Id.*

449. *Id.*

450. 389 U.S. 90 (1967).

451. *Id.* at 95 (internal quotation marks omitted). In vacating the writ of mandamus, the *Will* Court noted that the purpose of mandamus “is not to ‘control the decision of the trial court,’ but rather merely to confine the lower court to the sphere of its *discretionary* power.” *Id.* at 104 (emphasis added) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382–83 (1953)).

452. *Id.* (citation omitted).

453. *In re Nokia, Inc.*, 760 F.3d at 1348.

454. 771 F.3d 1317 (Fed. Cir. 2014).

455. *Id.* at 1322, 1326.

456. *Id.* at 1319 & n.1 (listing Align’s patents that were at issue). An alternative to traditional braces, the Invisalign System uses clear dental aligners to adjust the

patient is unique, the Invisalign dental aligners are custom-made, which requires the creation, transmission, and use of digital three-dimensional models for each incremental adjustment stage and related “digital data sets.”⁴⁵⁷

Subsequently, in August 2006, OrthoClear settled with Align and agreed to transfer certain intellectual property to Align and to enter into a consent order (“Consent Order”).⁴⁵⁸ Specifically, the Consent Order required that “[t]he incremental dental positioning adjustment appliances manufactured by or for OrthoClear referenced in the complaint and any other articles manufactured in violation of the patents or trade secrets described therein . . . are hereby prohibited from importation into the United States until the [occurrence of certain stated events].”⁴⁵⁹ As the Federal Circuit noted, “[t]he Consent Order also included successor and aiding-and-abetting provisions that extended the importation prohibition beyond OrthoClear.”⁴⁶⁰

Suspecting violations of the Consent Order by OrthoClear and related parties, Align filed an enforcement complaint with the USITC; the USITC began investigating several new respondents.⁴⁶¹ At issue in the investigation was whether the additional respondents (“the Intervenors”) violated the Consent Order by electronically importing into the United States digital data sets used by ClearCorrect where the digital data sets involved the use of Align’s trade secrets or “induced or contributed to the infringement of certain claims of Align’s patents.”⁴⁶² The court also addressed whether ClearCorrect’s and others’ use of the digital data sets violated the “aiding and abetting” provisions of the Consent Order.⁴⁶³ In initiating the investigation, as the Federal Circuit noted, the Commission’s Notice of Institution “recommended that the ALJ ‘may wish to consider’ a threshold issue: ‘whether the accused digital

alignment of a dental patient’s teeth. *Id.* at 1319. The adjustment is done on an incremental basis over a fixed period. *Id.*

457. *Id.* at 1319.

458. *Id.*

459. *Id.* (internal quotation marks omitted).

460. *Id.*

461. *Id.* at 1320. Here, the additional respondents (the “Intervenors”), which included various incarnations of an entity known as ClearCorrect, were alleged to be Orthoclear’s assigns, successors-in-interest, employees, officers, and etcetera. *Id.*

462. *Id.*

463. *Id.*

datasets identified in the enforcement complaint . . . are within the scope of the articles covered by the consent order.”⁴⁶⁴

Although the Notice of Institution stated that the ALJ should issue its decision “in the form of an initial determination (‘ID’) under Commission Rule 210.42(c), 19 C.F.R. § 210.42(c),” the ALJ instead chose to issue an order.⁴⁶⁵ In Order No. 57, the ALJ found that the data sets fell “within the scope of the term ‘articles manufactured’” as set forth in the Consent Order, and that transmission of the data sets within the United States, therefore, violated the Consent Order.⁴⁶⁶ Consequently, the ALJ denied a motion to terminate the investigation filed by the Intervenors and set the matter for trial.⁴⁶⁷

Upon review, the full Commission reversed Order No. 57 and terminated enforcement proceedings with respect to the Consent Order, holding that the Consent Order failed to specifically prohibit electronic transmission of the digital data sets.⁴⁶⁸ In reaching this conclusion, the Commission reasoned that, “the accused digital data sets were not covered by the scope of the Consent Order because the subject consent order did not contain an express provision prohibiting the electronic transmission of data.”⁴⁶⁹

On appeal, the Federal Circuit overturned the Commission’s reversal of Order No. 57.⁴⁷⁰ As the Federal Circuit noted, the review of the Commission’s determinations is governed by the APA, meaning that the Federal Circuit “must set aside any findings or conclusions of the Commission that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”⁴⁷¹ In the instant case, the Federal Circuit found that the Commission’s review of Order No. 57 violated the Commission’s own procedural

464. *Id.* at 1320–21 (quoting Certain Incremental Dental Positioning Adjustment Appliances and Methods of Producing Same; Notice of Institution of Formal Enforcement Proceedings, 77 Fed. Reg. 25,747 (May 1, 2012)).

465. *Id.* at 1321 (quoting Certain Incremental Dental Positioning Adjustment Appliances and Methods of Producing Same; Notice of Institution of Formal Enforcement Proceedings, 77 Fed. Reg. 25,747); *see* 19 C.F.R. § 210.42 (2014) (concerning “[i]nitial determinations”). Note also that part 210 of Title 19 of the Code of Federal Regulations “appl[ies] to investigations under section 337 of the Tariff Act . . . and related proceedings.” 19 C.F.R. § 210.1.

466. *Align Tech., Inc.*, 771 F.3d at 1321.

467. *Id.*

468. *Id.*

469. *Id.* (internal quotation marks omitted).

470. *Id.* at 1326.

471. *Id.* at 1322 (quoting 5 U.S.C. § 706(2)(A) (2012)).

rules, including Rule 210.42(c),⁴⁷² because an ALJ is required to deny certain motions—including a motion to terminate an investigation—by issuing an order, and because the Commission may not review on appeal an order issued by an ALJ unless the ALJ has first issued an initial determination.⁴⁷³ Because the Commission may not circumvent its own rules “without waiving, suspending, or amending them,” the Federal Circuit found that the Commission’s “review of Order No. 57 was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴⁷⁴

Finally, noting that the Commission could, on remand, properly waive application of Rule 210.42(c) and “propel[] this case back to us without the errant procedural flaw but substantially unchanged,” the Federal Circuit noted that “[t]he interests of judicial efficiency” required it to warn the Commission that it found the reasoning behind the Commission’s purported requirement that a remedial order specifically mention electronic data for the order to cover said data to be unpersuasive.⁴⁷⁵ Indeed, the Federal Circuit found that neither of the two cases identified by the Commission were sufficient to support the conclusion that it had “an established practice sufficient to put the public on notice” about the Commission’s requirement that remedial orders must specifically identify electronic data for said electronic data to be covered under any such remedial order.⁴⁷⁶

4. X2Y Attenuators, LLC v. International Trade Commission

In *X2Y Attenuators, LLC v. International Trade Commission*,⁴⁷⁷ the patentee, X2Y Attenuators, LLC (“X2Y”), filed a patent infringement complaint with USITC against Intel Corporation and related parties (“Intel”) under section 337.⁴⁷⁸ X2Y alleged that Intel unlawfully imported certain microprocessor products that contained components (specifically, certain electrodes) that allegedly infringed upon three

472. Rule 210.42(c)(1) states that an ALJ, in a section 337 proceeding, “shall grant [certain] types of motions by issuing an initial determination or shall deny them by issuing an order,” and rule 210.42(c)(2) provides that “[an ALJ] shall grant or deny [certain other] types of motions by issuing an initial determination [only]” 19 C.F.R. § 210.42(c) (2014).

473. *Align Tech., Inc.*, 771 F.3d at 1322 (citing 19 C.F.R. §§ 210.24, 210.42(c)(1)).

474. *Id.* (internal quotation marks omitted).

475. *Id.* at 1326.

476. *Id.*

477. 757 F.3d 1358 (Fed. Cir. 2014).

478. *Id.* at 1359.

of X2Y's patents.⁴⁷⁹ Although the parties referred to several of the claim terms appearing in the patents "collectively as 'electrode terms' or 'center ground plane terms'" during the USITC proceedings, as the Federal Circuit noted, "[t]he parties disputed whether the electrode terms were limited to the so-called 'sandwich' configuration—an arrangement of three electrodes in which a center conductor is flanked by paired differential, or oppositely charged, conductors."⁴⁸⁰

At the USITC proceedings, Intel argued that the claim terms related to the electrodes "should be limited to the sandwich configuration, [but] X2Y contended that the electrode terms require[d] no construction and should be given their plain and ordinary meanings."⁴⁸¹ Ultimately, the USITC adopted the construction of the electrode terms adopted by the ALJ, which construed "the electrode terms as requiring a common conductive pathway electrode positioned between paired electromagnetically opposite conductors."⁴⁸² As the Federal Circuit noted,

[t]his construction was based on specification disavowal—for example, the statement in the '500 patent that the sandwich configuration is "an essential element among all embodiments or connotations of the invention," and a statement incorporated by reference into the '444 patent that this configuration is a "feature[] universal to all the embodiments." Because X2Y conceded noninfringement on the basis of this construction, the USITC found no violation.⁴⁸³

On appeal, X2Y contended that the Commission committed three errors in finding non-infringement.⁴⁸⁴ First, X2Y argued that the USITC erred in construing the electrode terms, in that the USITC read into the electrode terms certain "functional and structural limitations into the meaning of the term 'electrode.'"⁴⁸⁵ Second, X2Y argued that USITC's construction of the various electrode terms were contradicted by the specifications of the asserted patents.⁴⁸⁶ Finally,

479. *Id.* at 1359–60 (citing U.S. Patent No. 8,023,241 (granted Sept. 20, 2011); U.S. Patent No. 7,916,444 (granted Mar. 29, 2011); U.S. Patent No. 7,609,500 (granted Oct. 27, 2009)).

480. *Id.* at 1360 (internal quotation marks omitted).

481. *Id.* at 1361.

482. *Id.* (internal quotation marks omitted).

483. *Id.* (alteration in original) (citations omitted).

484. *Id.* at 1361–62.

485. *Id.* at 1361.

486. *Id.*

noted the Federal Circuit, “X2Y argue[d] that the statements relied upon by the USITC [did] not constitute disavowal of claim scope.”⁴⁸⁷

However, the Federal Circuit affirmed the Commission’s ruling of non-infringement, concluding that the USITC “correctly construed the electrode terms.”⁴⁸⁸ In reaching this conclusion, the Federal Circuit found that statements in the patents clearly demonstrated disavowal of claim scope.⁴⁸⁹ For example, the Federal Circuit held that

[t]he patents’ statements that the presence of a common conductive pathway electrode positioned between paired electromagnetically opposite conductors is “universal to all the embodiments” and is “an essential element among all embodiments or connotations of the invention” constitute clear and unmistakable disavowal of claim scope. The standard for finding disavowal, while exacting, was met in this case.⁴⁹⁰

Indeed, as the Federal Circuit has specifically held that “labeling an embodiment or an element as essential may rise to the level of disavowal,” and went on to note that, in this case, “not only does the specification state that the ‘center common conductive pathway electrode’ flanked by two differential conductors is ‘essential,’ but it also spells out that it was an ‘essential element among *all embodiments or connotations of the invention.*”⁴⁹¹ Consequently, the Federal Circuit affirmed the USITC’s determination that Intel did not infringe upon any of X2Y’s patents, and, therefore, that Intel had not violated section 337.⁴⁹²

CONCLUSION

In 2014, the Federal Circuit addressed a wide variety of international trade matters ranging from customs duties and tariff assessments, to anti-dumping and countervailing duties, to section 337 cases. Generally speaking, the opinions delivered by the Federal Circuit involved basic principles of statutory construction, and, in most cases, the court interpreted the relevant statutes and regulations in a manner consistent with familiar principles of judicial precedent and administrative procedure.

That said, however, the Federal Circuit’s 2014 term was also striking, in a few respects, as the court also had the rare opportunity

487. *Id.* at 1361–62.

488. *Id.* at 1362.

489. *Id.*

490. *Id.* (citation omitted).

491. *Id.* (quoting U.S. Patent No. 7,609,500 (granted Oct. 27, 2009)).

492. *Id.* at 1363.

to discuss important and complex principles of law in the context of international trade law and litigation. In *Deckers*, for example, the Federal Circuit had the opportunity to discuss the principles of its unique stare decisis approach and jurisprudence in connection with an HTSUS classification analysis. And in *Guangdong Wireking*, the Federal Circuit had the opportunity to evaluate whether the Ex Post Facto Clause of the U.S. Constitution invalidated an amendment to the Tariff Act regarding the methods used to calculate AD and CVD rates.

The opinions issued by the Federal Circuit in 2014 also served to underscore another point: the significant role the Federal Circuit continues to play with respect to the international trade law and policy of the United States. Indeed, the Federal Circuit's international trade jurisprudence remains a key component of the legal foundation upon which all parties involved in international trade must rely, and the well-reasoned and well-considered opinions issued by the Federal Circuit in 2014 only serve to strengthen that foundation and to reinforce its relevance.

APPENDIX

Table: 2014 Precedential Decisions of the U.S. Court Of Appeals for the Federal Circuit

<i>2014 Federal Circuit Precedential Cases</i>	<i>Type</i>	<i>Agency</i>	<i>Disposition</i>
Align Technology, Inc. v. International Trade Commission, 771 F.3d 1317 (Fed. Cir. 2014).	Section 1337	International Trade Commission	Vacated and remanded
<i>In re</i> Nokia Inc., 760 F.3d 1348 (Fed. Cir. 2014) (per curiam).	Section 1337	International Trade Commission	Order denying petition for writ of mandamus (Newman, J., dissenting)
UPI Semiconductor Corp. v. International Trade Commission, 767 F.3d 1372 (Fed. Cir. 2014).	Section 1337	International Trade Commission	Affirmed in part, reversed in part, and remanded
X2Y Attenuators, LLC v. International Trade Commission, 757 F.3d 1358 (Fed. Cir. 2014).	Section 1337	International Trade Commission	Affirmed (Reyna, J., concurring)
Hartford Fire Insurance Co. v. United States, 772 F.3d 1281 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Home Meridian International, Inc. v. United States, 772 F.3d 1289 (Fed. Cir. 2014).	AD	Department of Commerce	Reversed
Lifestyle Enterprise, Inc. v. United States, 751 F.3d 1371 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed in part, reversed in part, and remanded
Marvin Furniture (Shanghai) Co. v. United States, 744 F.3d 1319 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Michaels Stores, Inc. v. United States, 766 F.3d 1388 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States, 753 F.3d 1227 (Fed. Cir. 2014).	AD	Department of Commerce	Vacated and remanded
Mukand, Ltd. v. United States, 767 F.3d 1300 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Peer Bearing Co.-Changshan v. United States, 766 F.3d 1396 (Fed. Cir. 2014).	AD	Department of Commerce	Vacated and remanded

<i>2014 Federal Circuit Precedential Cases</i>	<i>Type</i>	<i>Agency</i>	<i>Disposition</i>
Qingdao Sea-Line Trading Co. v. United States, 766 F.3d 1378 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Thai Plastic Bags Indus. Co. v. United States, 774 F.3d 1366 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Thai Plastic Bags Industries Co. v. United States, 746 F.3d 1358 (Fed. Cir. 2014).	AD	Department of Commerce	Affirmed
Fedmet Resources Corp. v. United States, 755 F.3d 912 (Fed. Cir. 2014).	AD/CVD	Department of Commerce	Reversed and remanded (Wallach, J., dissenting)
Guangdong Wireking Housewares & Hardware Co. v. United States, 745 F.3d 1194 (Fed. Cir. 2014).	AD/CVD	Department of Commerce	Affirmed (O'Malley, J., concurring)
Wind Tower Trade Coalition v. United States, 741 F.3d 89 (Fed. Cir. 2014).	AD/CVD	Department of Commerce	Affirmed
Essar Steel, Ltd. v. United States, 753 F.3d 1368 (Fed. Cir. 2014).	CVD	Department of Commerce	Affirmed
Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365 (Fed. Cir. 2014).	CVD	Department of Commerce	Affirmed
MacLean-Fogg Co. v. United States, 753 F.3d 1237 (Fed. Cir. 2014).	CVD	Department of Commerce	Reversed and remanded (Reyna, J., dissenting)
Alcan Food Packaging (Shelbyville) v. United States, 771 F.3d 1364 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Belimo Automation A.G. v. United States, 774 F.3d 1362 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Chemsol, LLC v. United States, 755 F.3d 1345 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Deckers Corp. v. United States, 752 F.3d 949 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Dependable Packaging Solutions, Inc. v. United States, 757 F.3d 1374 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed

<i>2014 Federal Circuit Precedential Cases</i>	<i>Type</i>	<i>Agency</i>	<i>Disposition</i>
GRK Canada, Ltd. v. United States, 761 F.3d 1354 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Vacated and remanded (Reyna, J., dissenting)
GRK Canada, Ltd. v. United States, 773 F.3d 1282 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Order denying rehearing (Newman, Reyna & Wallach, JJ., dissenting)
International Custom Products, Inc. v. United States, 748 F.3d 1182 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Link Snacks, Inc. v. United States, 742 F.3d 962 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
R.T. Foods, Inc. v. United States, 757 F.3d 1349 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
Riddell, Inc. v. United States, 754 F.3d 1375 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed in part and reversed in part
Roche Vitamins, Inc. v. United States, 772 F.3d 728 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
United States v. C.H. Robinson Co., 760 F.3d 1376 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed
United States v. Trek Leather, Inc., 767 F.3d 1288 (Fed. Cir. 2014), <i>petition for cert. docketed sub. nom</i> Shadadpuri v. United States (U.S. Feb. 13, 2015) (No. 14-986).	HTSUS	U.S. Customs and Border Protection	Affirmed
Victoria's Secret Direct, LLC v. United States, 769 F.3d 1102 (Fed. Cir. 2014).	HTSUS	U.S. Customs and Border Protection	Affirmed (Reyna, J., dissenting)