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2019 International Trade Law Decisions of the Federal Circuit

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2019 International Trade Law Decisions of the Federal Circuit

2019 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT

KEVIN J. FANL*

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INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit has jurisdiction over appeals from a number of administrative bodies, as well as subject-specific appeals from all U.S. district courts.¹ Two significant areas of appeal from district courts are patent law and trade law.² The Federal Circuit consists of twelve judges, whom the President appoints and the Senate confirms to lifetime terms. In this Article of the Federal Circuit Symposium issue, I will be examining key cases the Federal Circuit heard

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1. 28 U.S.C. § 1295(a) (2012).

2. § 1295(a)(4)–(7).

on appeal from the U.S. Court of International Trade (CIT). These cases typically involve matters of antidumping and countervailing duty (AD/CVD) law, customs classification, and the origin of imported goods. I will begin with an examination of classification cases.

I. CLASSIFICATION

A key element in international trade is the identification of goods being imported. Without the ability to identify a good, customs officers could not properly classify a good, determine whether any restrictions apply to it, and decide what tariff, if any, they should apply. The latter issue is of great significance to importers, who generally want to avoid excessive tariffs on certain goods.

Consider the famous 2005 case, *Conair Corp. v. United States*,³ which involved the import of simulated desktop waterfalls, also known as “Serenity Ponds.”⁴ The importer, Conair, classified these devices as “[p]umps for liquids,”⁵ which carried a 0% tariff rate. Upon review, Customs decided that the devices should be classified as “[o]ther articles of plastics,”⁶ which carried a tariff rate of 5.3%. The central question in the case was: *what are these devices?* The CIT ultimately decided that because the water pump was the essential element that made these plastic devices transform into “Serenity Ponds,” they should be classified as water pumps.⁷ The decision likely saved Conair millions of dollars in potential tariffs.

Classification in the United States is based upon the Harmonized Tariff Schedule, which is maintained by the World Customs Organization and to which more than 170 members abide. This schedule provides classifications for nearly every good in existence, though defining the nature of a particular good is often a complex process that U.S. Customs and Border Protection (CBP) performs upon the entry of the imported goods. Likewise, importers are no strangers to this process and can often use “tariff engineering” to avert certain tariffs. For instance, while the import of garlic powder carries a high tariff, blending that powder with 1% onion powder converts the good into a “vegetable blend,” subjecting it to a lower tariff.

3. 29 Ct. Int’l Trade 888 (2005).

4. *Id.* at 888–89.

5. U.S. INT’L TRADE COMM’N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2020), USITC Pub. 5011, subheading 8413.70.2004 (Jan. 2020).

6. *Id.* at subheading 3926.40.00.

7. *Conair Corp.*, 29 Ct. Int’l Trade at 899.

This Article's first section will highlight some of the key classification cases that were appealed to Federal Circuit and in the process, explain some key classification rules that the Federal Circuit helped to clarify this term. We begin with a case involving the nature of doorknobs.

Doorknobs are useful tools to allow entry into a home. But they are also useful to help us understand the classification of goods in the Harmonized Tariff Schedule of the United States (HTSUS). These seemingly straightforward pieces of hardware were the subject of *Home Depot v. United States*,⁸ which the Federal Circuit decided in February 2019.⁹

The *Home Depot* case was a challenge to CBP's classification of imported doorknobs with integral locks. CBP initially classified these products as locks under heading 8301 of the HTSUS, carrying a tariff of 5.7% *ad valorem*.¹⁰ Home Depot argued that the locks should have been classified as metal fittings for doors under heading 8302 of the HTSUS, carrying a tariff of 3.9% *ad valorem*.¹¹

Heading 8301, in relevant part, reads as follows: "Door locks, locksets and other locks suitable for use with interior or exterior doors (except garage, overhead or sliding doors)."¹²

Heading 8302, in relevant part, reads as follows:

Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof: [o]ther mountings, fittings and similar articles, and parts thereof . . . [o]f iron or steel, of aluminum or of zinc . . . [s]uitable for interior and exterior doors (except garage, overhead or sliding doors).¹³

Though both headings seem to be broad enough to include the subject merchandise, the question for the Federal Circuit was how to determine which heading was most appropriate. In cases like these, the Federal Circuit (and CBP) turns to the General Rules of Interpretation (GRI), which provide guidance in understanding the HTSUS.

The CIT agreed with CBP's classification determination, finding that heading 8301 wholly described the subject doorknobs. The CIT found that heading 8302 also describes the goods, but that heading 8301 does

8. *Home Depot U.S.A., Inc. v. United States*, 915 F.3d 1374 (Fed. Cir. 2019).

9. *Id.* at 1376.

10. *Home Depot U.S.A., Inc. v. United States*, 269 F. Supp. 3d 1306, 1308 (Ct. Int'l Trade 2017), *vacated*, 915 F.3d 1374 (Fed. Cir. 2019).

11. *Id.* at 1308.

12. U.S. INT'L TRADE COMM'N, *supra* note 5, at subheading 8301.40.6030.

13. *Id.* at subheading 8302.41.60.

so more completely. Whereas heading 8302 would include doorknobs, the subject merchandise was in fact locksets with keyed entry systems, making them a more complex product better described by heading 8301.¹⁴ The Federal Circuit disagreed.

The GRIs help determine proper HTSUS headings and subheadings to resolve classification disputes. The GRIs have four basic rules:

1. GRI 1 controls imported articles that a single classification heading or subheading describes.¹⁵

2. GRI 2(a) explains that the any heading covering a complete article will also cover an incomplete or unfinished article, as long as the unfinished article has the “essential character” of the complete article.¹⁶ GRI 2(a) explains that the any heading covering a complete article will also cover an incomplete or unfinished article, as long as the unfinished article has the “essential character” of the complete article.¹⁷ GRI 2(b) simply states that relevant parties should classify imported articles comprised of multiple materials or substances according to the tripartite GRI 3, which governs goods within the scope of multiple materials or substances according to the tripartite GRI 3, which governs goods within the scope of multiple headings.¹⁸

3. GRI 3(a) instructs those classifying goods that fall under multiple headings to defer to the most specific description.¹⁹ However, when multiple headings refer to only part of the materials and substances contained in a composite good, those headings are equally specific relative to that good.²⁰ If 3(a) does not apply to a given composite good, 3(b) directs parties to classify that good as if the composite only contained the material or component that gives the composite its essential character.²¹ When neither 3(a) nor 3(b) applies to a composite good, 3(c) instructs parties to classify the good under the heading that occurs last numerically among equally applicable headings.²²

14. *Home Depot*, 915 F.3d at 1377 (quoting *Home Depot*, 269 F. Supp. 3d at 1314) (“A lock, the court added, ‘is a multi-component device, of which one component is a lever. In some types of locks, the lever is a door knob.’”).

15. *CamelBak Prods., L.L.C. v. United States*, 649 F.3d 1361, 1364 (Fed. Cir. 2011).

16. U.S. INT’L TRADE COMM’N, *supra* note 5, General Rules of Interpretation 2(a).

17. *Id.*

18. *Id.* General Rules of Interpretation 2(b).

19. *Home Depot*, 915 F.3d at 1380.

20. U.S. INT’L TRADE COMM’N, *supra* note 5, General Rules of Interpretation 3(a).

21. *Id.* General Rules of Interpretation 3(b).

22. *Id.* General Rules of Interpretation 3(c).

4. Per GRI 4, relevant parties should classify goods that do not fall within the scope of the preceding rules under the heading corresponding to the most similar goods.²³

Applying the GRI, the Federal Circuit found that neither heading captured the whole product appropriately.²⁴ Heading 8301 describes door locks, whereas heading 8302 describes doorknobs.²⁵ As the subject merchandise is both a doorknob and a door lock, GRI 1 stipulates that neither heading is dispositive in the classification process because both headings only describe part of the good.²⁶

Having concluded that neither heading is dispositive due to lack of completeness, the Federal Circuit moved on to consider GRI 2, which focuses instead on the essential character of the good. “Essential character” typically refers to the principal use of the product—the reason consumers might demand it, for instance.²⁷ In the 2005 case, *Conair v. United States*, the subject merchandise was a desktop waterfall, and the classification dispute was whether the water pump that moved water through the device or the plastic parts that comprised the actual waterfall constituted the waterfall’s essential character.²⁸ In that case, the element that determined the essential character was the water pump, without which the waterfall would be nothing more than a piece of plastic.²⁹

The Federal Circuit concluded in the *Home Depot* case that GRI 3(b) was the appropriate rule for classifying the imported locksets there.³⁰ The Federal Circuit remanded the case to the CIT to determine the essential character of the locksets.³¹

In the second classification case during the Federal Circuit’s last term, the court again relied upon the GRIs to uphold a lower court decision classifying fiberoptic telecommunication devices. *ADC Telecommunications, Inc. v. United States*³² involved a challenge to CBP’s classification of such equipment under HTSUS heading 9013 (“other

23. *Id.* General Rules of Interpretation 4.

24. *Home Depot*, 915 F.3d at 1380.

25. *Id.*

26. *Id.* at 1378–80; see U.S. INT’L TRADE COMM’N, *supra* note 5, General Rules of Interpretation 1.

27. See *Estee Lauder, Inc. v. United States*, 815 F. Supp. 2d 1287, 1300 (Ct. Int’l Trade 2012); *Structural Indus., Inc. v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005); *Conair Corp. v. United States*, 29 Ct. Int’l Trade 888, 895 (2005).

28. *Conair Corp.*, 29 Ct. Int’l Trade at 895–96 (2005).

29. *Id.* at 896–97.

30. *Home Depot*, 915 F.3d at 1380.

31. *Id.* at 1381.

32. 916 F.3d 1013 (Fed. Cir. 2019).

optical appliances and instruments, not specified or included elsewhere in this chapter”).³³ The equipment in question includes connectors on the ends of fiberoptic cables that allow installation without the need to splice the cable.

ADC argued that the imported fiberoptic modules should have been classified under heading 8517 (“other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)”), which bears no duty.³⁴ The original classification includes a duty rate of 4.5% ad valorem.³⁵ The key question in this case was whether the modules are prima facie classifiable under the subheading CBP relied on, in which case there would be no need to consider a more specific classification.

The GRIs are used when more than one heading could potentially describe subject imports. A court will apply the GRIs in chronological order, “meaning that subsequent rules are inapplicable if a preceding rule provides proper classification.”³⁶ The first GRI states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes.”³⁷ These headings are examined without regard to the subheadings therein.³⁸

Here, the Federal Circuit turned to technical and general dictionaries to aid in defining the meaning of optical devices. The Federal Circuit found that the 9013 heading simply required that the subject merchandise be primarily used for transmitting data through the use of light.³⁹ The CIT agreed with ADC that the subject merchandise could also be classified under heading 8517; however, that heading differentiates products on the basis of physical characteristics rather than the use of the cables (i.e., the transmission of data).⁴⁰ Also, as heading 8517 specifically excludes any product classified by heading 9013, and as the Federal Circuit confirmed that the modules should be classified under heading 9013, the modules could not fall within heading 8517.⁴¹

33. *Id.* at 1015 (Fed. Cir. 2019); U.S. INT’L TRADE COMM’N, *supra* note 5, at subheading 9013.

34. *ADC Telecomm.*, 916 F.3d 1013 at 1015.

35. *Id.*

36. *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158, 1163 (Fed. Cir. 2017).

37. U.S. INT’L TRADE COMM’N, *supra* note 5, General Rules of Interpretation 1.

38. *See R.T. Foods, Inc. v. United States*, 757 F.3d 1349, 1353 (Fed. Cir. 2014).

39. *See ADC Telecomm.*, 916 F.3d at 1019, 1021.

40. *Id.* at 1021.

41. *Id.* at 1022–23.

Finally, the Federal Circuit applied GRI 6, which requires that, once a good has been classified under a particular heading, the first four GRIs would be reapplied to determine the appropriate subheading under that heading.⁴² Applying that rule of interpretation, the Federal Circuit concluded that the subject merchandise did not fall within any of the defined subheadings.⁴³ Accordingly, the Federal Circuit classified the goods in the “other” category.⁴⁴

Most classification cases involve disputes over very small details within target goods. For example, in *Irwin Industrial Tool Co. v. United States*,⁴⁵ the Federal Circuit determined whether the target imports were pliers or wrenches.⁴⁶ The CBP sought to classify the goods as wrenches under heading 8204.12.00, which carries a 9% duty, whereas the importer sought to classify the goods as pliers under 8203.20.60, which carries a duty of \$0.12 per dozen plus 5.5%.⁴⁷

The unique contribution of this case during the 2019 term is the discussion of when to apply an *eo nomine* interpretation and when to limit a definition by use. When applying *eo nomine* interpretation, a term is considered to include all possible definitions and forms and is not limited by use.⁴⁸ When limiting a definition by use, a term can be defined by how the good is used in practice.⁴⁹ The Federal Circuit reiterates that “a use limitation should not be read into an *eo nomine* provision unless the name itself inherently suggests a type of use.”⁵⁰

In the *Irwin* case, CBP attempted to define the term “wrench” as *eo nomine*, but defined “pliers” by their use, which it found to be “pincers with two handles and jaws adapted for manipulating small objects or for bending and shaping wire, sometimes including a wire cutter, and whose grasp is dependent upon maintaining continuous hand pressure.”⁵¹ CBP’s chosen dictionary definition for “wrench,” on the

42. U.S. INT’L TRADE COMM’N, *supra* note 5, General Rules of Interpretation 6. Note that GRIs I–IV apply in order until one of the rules fits the particular situation. GRIs V and VI apply independently as needed; *see, e.g.*, *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1442 (Fed. Cir. 1998).

43. *ADC Telecomm.*, 916, F.3d at 1023 (Fed. Cir. 2019).

44. *Id.*; *see* U.S. INT’L TRADE COMM’N, *supra* note 5, at subheading 9013.80.9000.

45. *Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356 (Fed. Cir. 2019).

46. *Id.* at 1357–58.

47. *See* U.S. INT’L TRADE COMM’N, *supra* note 5, at subheading 8203.20.6030.

48. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (quoting *Hayes-Sammons Chem. Co. v. United States*, 55 C.C.P.A. 69, 75 (1968)).

49. *Id.*

50. *Id.*

51. *Irwin Indus. Tool Co.*, 920 F.3d at 1358–59.

other hand, referred to tools “used for holding, twisting, or turning a bolt, nut, screwhead, pipe or other object.”⁵² With these definitions in hand, CBP classified Irwin’s goods, which included “straight jaw locking pliers, large jaw locking pliers, curved jaw locking pliers with and without wire cutters, and long nose locking pliers with wire cutters,” as wrenches.⁵³ CBP went on to state that “locking tools should not be included in the definition of pliers because the primary purpose of a locking mechanism is to permit the *maximum application of torque*, which is the function of a wrench.”⁵⁴

Irwin countered CBP’s use-based definition of “wrenches” and argued that they should be defined *eo nomine*. Irwin made the point that if the CIT accepted CBP’s definition, the CIT would have to classify a crowbar as a wrench since the use of a crowbar is “to permit the maximum application of torque.”⁵⁵ The CIT agreed with Irwin and applied dictionary definitions to both goods.⁵⁶

The Federal Circuit agreed with the CIT that the term “wrench” is an *eo nomine* term not limited by use.⁵⁷ The Federal Circuit noted that some wrenches and pliers are created for specific purposes; however, these exceptions are not a reasonable basis to limit the definition of the object itself to those specified uses.⁵⁸ Applying these *eo nomine* definitions, the Federal Circuit agreed that the target goods were properly classified as pliers.⁵⁹ As the next case indicates, these ambiguous classification distinctions can result in significant unexpected expenses for companies.

Christmas became a little more costly for Rubie’s Costume Company thanks to the Federal Circuit’s decision on Santa costumes.⁶⁰ This case, *Rubies Costume Co. v. United States*,⁶¹ addressed the question of what makes a costume a festive article rather than fancy dress of textile material. The subject good was a nine-piece Santa suit, consisting of jacket, pants, hat, and all of the accoutrements typical of the character.⁶² The items were classified in different subheadings across chapters 61 and 62, which cover fancy dress and carry higher duty

52. *Id.* at 1358.

53. *Id.* at 1357.

54. *Id.* at 1359 (emphasis added) (internal quotation marks omitted).

55. *Id.* at 1358–59.

56. *Id.* at 1358.

57. *Id.* at 1361.

58. *Id.*

59. *Id.* at 1360.

60. *Rubies Costume Co. v. United States*, 922 F.3d 1337, 1339–40 (Fed. Cir. 2019).

61. 922 F.3d 1337 (Fed. Cir. 2019).

62. *Id.* at 1340.

rates.⁶³ Rubie's argued that the goods should enter duty-free as festive articles under chapter 95.⁶⁴

This case was not the first time that the Federal Circuit addressed the definition of costumes. Rubie's was party to a 2003 Federal Circuit decision addressing the importation and classification of Halloween costumes.⁶⁵ In that case, Rubie's asserted that the costumes should be classified as festive articles under chapter 95; however, the court pointed out that Note 1(e) to that chapter excludes "fancy dress, of textiles of chapter 61 or 62," from chapter 95.⁶⁶ The Federal Circuit in that case defined "fancy dress" to include costumes that are wearable as apparel.⁶⁷

Following the first *Rubies Costume Co. v. United States*⁶⁸ decision in 2003, CBP went on to issue an Informed Compliance Publication (ICP), which distinguished flimsy, nondurable costumes that would qualify for classification under chapter 95 from well-made, normal wearing apparel that would qualify for classification under chapters 61 and 62.⁶⁹ CBP applied this guidance to the Santa suit in the more recent case and determined that the high-quality manufacture of the suit, including the "woven satin fabric lining" of the jacket that is suitable for dry cleaning and multiple uses, the acrylic and polyester pants with hemmed pockets, the 100% polyester knit gloves, and so forth, excluded the Santa suit from chapter 95 because it qualified as "fancy dress."⁷⁰

The CIT agreed with the interpretation by CBP and denied Rubie's motion for summary judgment.⁷¹ The Federal Circuit likewise agreed and clarified that "fancy dress" is not limited to apparel that one would wear on a regular basis, but rather that it could include a well-made costume that one could wear multiple times due to its quality construction.⁷² The CIT correctly called these costumes "well-made" and

63. *Id.* at 1341.

64. *Id.*

65. *Rubies Costume Co. v. United States*, 337 F.3d 1350, 1351–52 (Fed. Cir. 2003).

66. *Id.* at 1352, 1356.

67. *Rubies Costume Co.*, 922 F.3d at 1345.

68. 337 F.3d 1350 (Fed. Cir. 2003).

69. See U.S. DEP'T OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: CLASSIFICATION OF TEXTILE COSTUMES UNDER THE HTSUS 10 (2008), https://www.cbp.gov/sites/default/files/documents/icp077_3.pdf [<https://perma.cc/JFD7-M6K6>].

70. *Rubies Costume Co.*, 922 F.3d at 1345.

71. *Id.* at 1341.

72. *Id.* at 1345.

able to survive several holiday seasons, thereby relieving the costumes of their festive article status and turning them into fancy dress.⁷³

The Federal Circuit had an opportunity to apply its reasoning from *Rubies* right away in a case dealing with sausage casings imported from Germany.⁷⁴ In *Kalle USA, Inc. v. United States*,⁷⁵ the importer sought to classify its casings, which consist of textile covering coated with a layer of plastic on one side, as plastics under chapter 39 of the HTSUS, which carry a duty rate of 3.1%.⁷⁶ CBP chose to classify them as “made-up textiles” under chapter 63 with a duty rate of 7%.⁷⁷

The key issue in *Kalle* was how to define the term “completely embedded” in plastics as it is used in chapter 59 of the HTSUS. The Federal Circuit explained that the HTSUS does not allow a good to be classifiable under two separate headings when there are mutually exclusive rules in those headings.⁷⁸ In this case, the rules are found in chapter 39 and section XI, which encompasses chapters 59 and 63. Note 1(h) of section XI stipulates that fabrics that are “impregnated, coated, covered or laminated with plastics” are covered by chapter 39 and are excluded from section XI.⁷⁹ Note 2(p) of chapter 39 excludes textile goods from section XI from chapter 39.⁸⁰ In *Kalle*, the Federal Circuit addressed whether the subject imports were “completely embedded” in plastics, as “completely embedded” is used under chapter 59 of the HTSUS.

The Federal Circuit applied the common definition of “completely embedded” and found that the plastic would have to be “set or fix[ed] firmly in a surrounding mass.”⁸¹ The Federal Circuit concluded that “for a textile to be completely embedded in plastic, it must be entirely firmly fixed in the plastic.”⁸² Following the logic of *Rubies*, the Federal Circuit reasoned that the exclusionary rules must be read in context to understand why they were included in the HTSUS in the first place.⁸³

73. *Id.* at 1345–46.

74. *Kalle USA, Inc. v. United States*, 923 F.3d 991, 995 (Fed. Cir. 2019) (per curiam).

75. 923 F.3d 991 (Fed. Cir. 2019).

76. See U.S. INT’L TRADE COMM’N, *supra* note 5, at subheading 3917.39.0050.

77. *Id.* at subheading 6307.90.98.

78. *Kalle USA*, 923 F.3d at 994.

79. U.S. INT’L TRADE COMM’N, *supra* note 5, § XI n.1 (h).

80. *Id.* at ch. 39 n.2(p).

81. *Kalle USA*, 923 F.3d at 995 (quoting *Embedded*, WEBSTER’S NEW WORLD DICTIONARY, 442–43 (3d coll. ed. 1988)) (internal quotation marks omitted).

82. *Id.* (quoting *Kalle USA, Inc. v. United States*, 273 F. Supp. 3d 1319, 1333 (Ct. Int’l Trade 2017)).

83. *Id.* at 996.

Here, the court suggested that the drafters wanted to make a distinction between fabrics that are impregnated with plastic and those that are completely embedded in plastics.⁸⁴ While this does not mean that the fabric must have plastic on all sides, it does have to be fixed in a surrounding mass of plastic.⁸⁵

Continuing with the line of discussion about *eo nomine* versus use provisions in the HTSUS, the Federal Circuit used a single-entry case brought by Ford Motor Company to explain when use can be considered even in an *eo nomine* term.⁸⁶ In *Ford Motor Co. v. United States*,⁸⁷ Ford imported a van suitable for either passengers or cargo, depending on the interior layout of the van.⁸⁸ When defined as a cargo van, the vehicle is subject to a 25% tariff.⁸⁹ As a passenger van, the tariff would be only 2.5%.⁹⁰

The subject vehicles were imported with a second row of seats, making them both appropriate for passengers and, in the opinion of the CIT, classifiable as passenger vans.⁹¹ However, after importation but before leaving the port, Ford removed the rear seats and plugged the holes to make the vans suitable for cargo.⁹² The actual or intended use would normally be considered for HTSUS terms that are not *eo nomine*. Generally, “a use limitation should not be read into an *eo nomine* provision.”⁹³ However, the Federal Circuit notes that when the definition itself suggests a “type of use,” the usage should not be ignored.⁹⁴

The CIT determined that the HTSUS definition of the subject vehicles was *eo nomine*; thus, consideration of the use of the vehicle was unnecessary in the CIT’s analysis.⁹⁵ The Federal Circuit provided examples of fact patterns that would require a court to look beyond the definition itself and examine the use of the good. For instance, for a handbag to be classified as a “vanity case,” its primary use would have

84. *Id.*

85. *Id.*

86. *Ford Motor Co. v. United States*, 926 F.3d 741, 753 (Fed. Cir. 2019).

87. 926 F.3d 741 (Fed. Cir. 2019).

88. *See generally id.* at 745–47 (explaining how Ford converted the passenger vans into cargo vans after importation).

89. U.S. INT’L TRADE COMM’N, *supra* note 5, at subheading 8704.31.00.

90. *Id.* at subheading 8703.23.01.

91. *Ford Motor Co.*, 926 F.3d at 748.

92. *Id.* at 747.

93. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999).

94. *Id.*; *see also GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014) (reaffirming this approach).

95. *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1332 (Ct. Int’l Trade 2017), *rev’d*, 926 F.3d 741 (Fed. Cir. 2019).

to be to hold cosmetics.⁹⁶ Similarly, for the definition of “other wood screws” to apply, the primary use would have to be to fasten wood.⁹⁷ Referencing the precedent set in *Marubeni America Corp. v. United States*,⁹⁸ the Federal Circuit reversed the CIT and found that when use is implied in an *eo nomine* term, the actual or intended use can be considered when classifying the goods.⁹⁹

II. ANTIDUMPING AND COUNTERVAILING DUTY CASES

One of the most active areas of defensive trade law in the United States is the area of antidumping and countervailing duties. Both of these defenses to imports arose in the Tariff Act of 1930, which specifies that the United States may impose duties on imports to “provide relief from market distortions caused by foreign producers who sell their merchandise in the United States for less than fair market value” (antidumping) or “to address government subsidies to foreign producers” (countervailing duties).¹⁰⁰ Each of these defenses must be justified by an investigation which, today, is conducted by the U.S. International Trade Commission (USITC), an independent body that works with the Department of Commerce (Commerce) to assess material injury.

To determine whether an exporter is dumping a product in the United States, Commerce first conducts its own investigation to assess whether an imported good is being sold in the United States below fair market value and, if so, by how much (i.e., the dumping margin). Simultaneously, the USITC assesses:

- (1) whether there is a “reasonable indication” that an industry is materially injured or is threatened with material injury, or
- (2) whether the establishment of an industry is materially retarded, by reason of imports under investigation by the Department of Commerce that are allegedly sold at less than fair value in the United States or subsidized.¹⁰¹

To counter dumping, the United States conducts investigations to assess whether and to what extent an exporter is dumping an imported

96. *Ford Motor Co.*, 926 F.3d at 751 (citing *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1311 (Fed. Cir. 2003)).

97. *Id.* (citing *GRK*, 761 F.3d at 1359).

98. 35 F.3d 530 (Fed. Cir. 1994).

99. *See id.* at 534–35 (Fed. Cir. 1994); *see also Ford Motor Co.*, 926 F.3d at 754 (“The subject merchandise is not principally designed for the transport of persons.”).

100. *Bell Supply Co. v. United States*, 888 F.3d 1222, 1225 (Fed. Cir. 2018) (referring to 19 U.S.C. §§ 1671, 1673 (2012)).

101. *Understanding Antidumping & Countervailing Duty Investigations*, U.S. INT’L TRADE COMM’N, https://www.usitc.gov/press_room/usad.htm [<https://perma.cc/5PFL-PL4L>].

product and, where appropriate, levy an additional duty on that imported good to offset the cost differential between the good's fair market value and its sales price. According to § 1673 in Title 19 of the U.S. Code, any imported good sold or likely to be sold on "the United States [market] at less than its fair value" may qualify for an antidumping duty.¹⁰²

A. Calculating the Dumping Margin

The dumping margin for subject merchandise is calculated by subtracting the price of the imported good in the export market from the price of the good in the United States—the "export price."¹⁰³ The process for calculating the dumping margin is outlined in § 1673 of the Countervailing and Antidumping duties under Title 19 of the U.S. Code,¹⁰⁴ which stipulates the following steps:

1. Commerce determines the "export price" (the price paid by the first unaffiliated buyer in the United States) of the target merchandise;¹⁰⁵
2. Commerce determines the "normal value" (the price sold in the exporting market) of the target merchandise;¹⁰⁶
3. If the export price is lower than the normal value, Commerce sets the duty rate at the difference between the two prices;¹⁰⁷
4. Finally, Commerce establishes the "dumping margin" by using the weighted average of all targeted exporters.¹⁰⁸

Despite this relatively straightforward-sounding process, in practice, the calculation is much more complicated. The export price is determined in one of two ways. First, it may reflect the price at which the subject merchandise is sold or the price at which it is agreed to be sold prior to importation by the foreign producer to an unaffiliated buyer in or exporter to the United States.¹⁰⁹ This is known as the "export price." However, if the first sale is not to an unaffiliated buyer or exporter, Commerce must determine the "constructed export price."¹¹⁰ This second method takes the price of the first sale to the affiliated buyer or exporter and adjusts it based upon a number of specified criteria.

102. § 1673.

103. *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1353 (Fed. Cir. 2010).

104. 19 U.S.C. § 1673.

105. § 1677a(a).

106. § 1677b(a)(1)(B)(i).

107. § 1673.

108. § 1677(35).

109. § 1677a(a).

110. § 1677a(b).

Among the criteria by which the constructed export price is adjusted are expenses incurred by the producer or exporter. These expenses include sales commissions, warranties and credit expenses, selling expenses the seller pays on behalf of the purchaser, costs related to further manufacture in the United States, and associated profit.¹¹¹ Commerce deducts these expenses from the sales price, thus increasing the dumping margin.

As discussed above, the dumping margin is calculated by subtracting the export price or the constructed export price from the “normal value,” which is the price the good is sold for in the exporting market.¹¹² The normal value is determined by calculating the sale price for the product in the exporting country where it is first sold (or offered for sale) for consumption within that country. This valuation method assumes the supply, channel of trade, and volume of trade is consistent with those of the importing country.¹¹³ The statute also specifies a number of adjustments that can offset this price.¹¹⁴

After investigating power transformer imports from Korea at the request of domestic producers, including ABB Inc., Commerce imposed an antidumping duty on those imports in 2012.¹¹⁵ Hyundai was a mandatory respondent in that investigation. Hyundai’s first sales were to a seller affiliated with Hyundai. Accordingly, Commerce used the constructed export price method to determine the sales price of the target goods.¹¹⁶

In *ABB, Inc. v. United States*,¹¹⁷ referred to as the Hyundai case, the main issue revolved around how to calculate a commission adjustment when the commission is paid on U.S. sales but not on foreign sales.¹¹⁸ The Federal Circuit found that Commerce properly reduced the constructed export price by the amount of the U.S. sales commission;¹¹⁹ however, Hyundai contended that Commerce failed to adjust the normal value with a commission offset.¹²⁰ The Federal

111. § 1677a(d)(1)–(3).

112. § 1677b(a)(1)(B)(i).

113. *Id.*

114. § 1677b(a)(6)(A)–(C).

115. *See* Large Power Transformers from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 Fed. Reg. 9204, 9204 (Feb. 16, 2012).

116. *Id.* at 9207.

117. 920 F.3d 811 (Fed. Cir. 2019).

118. *Id.* at 812–13.

119. *Id.* at 817.

120. *Id.* at 815.

Circuit agreed with the CIT in finding Commerce’s justification for not providing a commission offset reasonable.¹²¹ Commerce stated that it only offsets a commission (i.e., reduces the normal value by that amount) when the seller pays those commissions in the home market or outside the United States.¹²² In the case of commissions paid only in the United States, Commerce reduces those amounts from the export price or constructed export price, as it did in this case.¹²³

B. Determination of Origin

In order to measure the difference in value from the foreign market to the U.S. market, Commerce must determine two things: first, it must classify the imports to ensure that it is valuing the correct good under investigation, and; second, it must determine from where the good was shipped—its origin.¹²⁴ The origin of the good is typically determined by identifying the location in which it was manufactured or processed.¹²⁵ However, in cases in which the good was pieced together or transformed in more than one country, Commerce typically follows the substantial transformation test.¹²⁶

The substantial transformation test enables Commerce to determine whether a good changed origin on the basis of processing in a country other than its first point of origin.¹²⁷ If a product is manufactured in one country but assembled in another, that product “loses its identity and is transformed into a new product having a new name, character and use.”¹²⁸

This term, the Federal Circuit heard a case that dealt with an application of a test other than the substantial information test during an AD/CVD investigation.¹²⁹ The case, *Canadian Solar, Inc. v. United States*,¹³⁰ involved solar panels imported from China and began with a 2011 investigation spawned by a petition from a domestic solar panel

121. *Id.* at 826.

122. *Id.* at 825–26.

123. *Id.*

124. Notice of Final Determination of Sales at Less than Fair Market Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 Fed. Reg. 37,062, 37,065 (July 9, 1993).

125. *See id.* at 37,065.

126. *See id.* (explaining “substantial transformation” refers to the degree to which a product is processed or manufactured in a country to be deemed a product of that country).

127. *Id.*

128. *Bell Supply Co. v. United States*, 888 F.3d 1222, 1228 (Fed. Cir. 2018) (quoting *Bestfoods v. United States*, 165 F.3d 1371, 1373 (Fed. Cir. 1999)).

129. *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 912 (Fed. Cir. 2019).

130. 918 F.3d 909 (Fed. Cir. 2019).

manufacturer, SolarWorld.¹³¹ In that case, Commerce concluded that because the solar cells can be manufactured in China but assembled elsewhere, or manufactured elsewhere but assembled in China, it should apply the substantial transformation test to assess the imports' origin.¹³² Its conclusion was based upon the determination that the component giving origin was the solar cell, not the assembly of the solar panels.¹³³ A similar case involving imports from Taiwan resulted in the same finding.¹³⁴

However, in a second investigation of those cells, SolarWorld alleged that China circumvented its duties by assembling panels using only non-Chinese cells.¹³⁵ During the investigation, Commerce accordingly chose to depart from the substantial transformation test and instead applied the "country of assembly test."¹³⁶ Commerce justified its departure from the standard test of origin for the following reasons: (1) the solar panel industry is unique because of its adaptable supply chain, thus allowing trade to easily shift in the fact of an AD/CVD order; (2) the scope language of the first AD/CVD order is neither administrable nor enforceable; and (3) Commerce needed a workable mechanism to determine injury in lieu of the substantial transformation test.¹³⁷

Petitioners in the original antidumping order case, *SunPower Corp. v. United States*,¹³⁸ contended that Commerce's new test of origin "was inconsistent with the agency's prior practice for determining country of origin in similar proceedings, and departed from that practice without sufficient explanation."¹³⁹ The CIT agreed with the petitioners and found that Commerce departed from its prior practice without providing an ample justification for doing so.¹⁴⁰ On remand, Commerce stated that it has broad discretion to apply the test it believes is most appropriate in an investigation.¹⁴¹ Commerce also

131. *Id.* at 912, 914; *see also* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018 (Dec. 7, 2012).

132. *SunPower Corp. v. United States*, 253 F. Supp. 3d 1275, 1279 n.3 (Ct. Int'l Trade 2017).

133. *Id.* at 1278–79, 1279 n.3.

134. Certain Crystalline Silicon Photovoltaic Products from Taiwan: Antidumping Duty Order, 80 Fed. Reg. 8596, 8596 (Feb. 18, 2015).

135. *Canadian Solar*, 918 F.3d at 914–15.

136. *Id.* at 915.

137. *Id.* (citing *SunPower*, 253 F. Supp. 3d at 1283).

138. 179 F. Supp. 3d 1286 (Ct. Int'l Trade 2016).

139. *SunPower*, 253 F. Supp. 3d at 1283.

140. *SunPower*, 179 F. Supp. 3d at 1288–89.

141. *Canadian Solar*, 918 F.3d at 915–16.

stated that the products at issue were distinct, since every investigation creates a new class of products.¹⁴² Finally, Commerce explained that it needed a test that would consider the role of China, which had allegedly been evading prior investigations and undermining the basis for AD/CVD duties.¹⁴³

The CIT upheld Commerce's second determination and found its justification reasonable.¹⁴⁴ Petitioners appealed to the Federal Circuit. On appeal, the Federal Circuit reiterated the deference it provides to Commerce in its interpretation of the Tariff Act, which did not specify how Commerce determines the class of goods to be investigated.¹⁴⁵ In addition, this authority encompasses Commerce's ability to determine country of origin.¹⁴⁶ The only caveat is that Commerce must justify its reasoning if it decides to shift from one standard to another, as it did here.¹⁴⁷

The Federal Circuit reviewed Commerce's justification for departing from its previous policy to practice to another using the *arbitrary or capricious* standard, which asks whether the explanation of Commerce reflects reasoned decision making.¹⁴⁸ "[A]n explanation is reasoned if Commerce demonstrates that 'the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.'"¹⁴⁹ Here, the Federal Circuit agreed with the CIT that Commerce made a reasonable decision to depart from the prior practice of *substantial transformation* in this case and that it had adequate reason to do so.¹⁵⁰

C. Procedures for and Exceptions to AD/CVD Orders

A significant and controversial element to the AD/CVD investigation process is the determination that an exporting country is a nonmarket economy ("NME"). If Commerce determines that the exporting country is indeed an NME, the calculation of the dumping margin changes on the assumption that the sales price in that

142. *Id.* at 916.

143. *Id.*

144. *SunPower*, 253 F. Supp. 3d at 1288.

145. *Canadian Solar*, 918 F.3d at 917; *see also* *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (allowing agencies to interpret their authority when a statute, such as in this case, is silent on the matter).

146. *Canadian Solar*, 918 F.3d at 917 (citing *Bell Supply Co. v. United States*, 888 F.3d 1222, 1228–29 (Fed. Cir. 2018)).

147. *Id.* at 917

148. *Id.*

149. *Id.* at 918 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

150. *Id.* at 920.

exporting country would not reflect the fair market value.¹⁵¹ Accordingly, Commerce and the USITC turn to a market economy at a similar level of economic development, and they rely upon the “factors of production” used in making a comparable product in that country.¹⁵² Commerce must value the factors of production “to the extent possible . . . in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.”¹⁵³ The resulting value is known as the “surrogate value” of the goods.¹⁵⁴

Upon determining that dumping has or will occur, Commerce is instructed to publish an antidumping duty order that directs CBP to collect the duty for the imports subject to the investigation.¹⁵⁵ The order remains in place indefinitely; however, due to a change in law following passage of the Uruguay Round Agreements Act¹⁵⁶ in 1995, Commerce and the USITC are required to conduct antidumping duty administrative reviews every five years to determine whether the order should be modified or eliminated.¹⁵⁷ These are known as “sunset reviews.”¹⁵⁸

In addition to the sunset reviews, Commerce and the USITC are required to conduct annual administrative reviews of orders upon request by interested parties.¹⁵⁹

Lastly, Commerce and the USITC are required to conduct an administrative review when a petitioner claims to be a “new shipper” that was not exporting the subject goods at the time of the original dumping investigation.¹⁶⁰ In these cases, Commerce is required to determine an individual weighted average for each of the known

151. 19 U.S.C. § 1677b(c)(1) (2012).

152. § 1677b(c)(1).

153. § 1677b(c)(4).

154. *See, e.g.,* *Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1344, 1352 (Ct. Int'l Trade 2018) (“When an antidumping duty proceeding involves a nonmarket economy country, Commerce determines normal value by valuing the factors of production in a surrogate country . . . and those values are referred to as ‘surrogate values.’”).

155. § 1673e(a).

156. § 3511.

157. § 1675(c).

158. 19 C.F.R. § 351.218 (2019).

159. 19 U.S.C. § 1675(a)(1).

160. § 1675(a)(2)(B)(i); *see also* 19 C.F.R. § 351.214(a) (2019).

exporters of the subject merchandise.¹⁶¹ This is a process that has been subject to abuse in the past.¹⁶²

The calculation of dumping margins for exporters in NMEs and exceptions for new shippers appeared in *Weishan Hongda Aquatic Food Co. v. United States (China Kingdom)*.¹⁶³ In that case, Commerce conducted an administrative review of a dumping order that had been in effect since 1997 on exports of crawfish tail meat from China.¹⁶⁴ The 2014 review utilized data from the two largest exporters, China Kingdom and Deyan, while Ocean Flavor joined as a voluntary participant.¹⁶⁵ Additionally, Commerce combined this administrative review with new shipper reviews for three companies, including Weishan Hongda Aquatic Food Co. (Hongda).¹⁶⁶

Given that China was treated as an NME in this review, Commerce selected six countries that it believed would be adequate surrogate countries—South Africa, Colombia, Bulgaria, Thailand, Ecuador and Indonesia.¹⁶⁷ Following Commerce’s “regulatory preference” to value factors of production from a single country, Commerce chose to use only Thailand as the surrogate for China.¹⁶⁸ The factors of production that Commerce evaluated were: (1) manufacturing overhead; (2) selling, general, and administrative expenses; and (3) profit as determined by reviewing nonproprietary information on financial statements.¹⁶⁹

Relying on data from two Thai companies, Commerce determined that the weighted average dumping margin for each of the Chinese exporters was 0.0%.¹⁷⁰ However, when Commerce issued its final report

161. 19 U.S.C. § 1677f-1(c)(1).

162. See generally Kevin J. Fandl, *Promoting International Business Development While Protecting Domestic Markets: An Analysis of the New Shipper Review Policy of the United States*, 36 GEO. J. INT’L L. 605, 606, 614–18 (2005).

163. *Weishan Hongda Aquatic Food Co. v. United States (China Kingdom)* 917 F.3d 1353, 1356 (Fed. Cir. 2019).

164. *Id.*; see also Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat from the People’s Republic of China, 62 Fed. Reg. 48,218, 48,219 (Sept. 15, 1997).

165. See Initiation of Antidumping and Countervailing Duty Administrative Reviews, 79 Fed. Reg. 64,565, 64,567–68 (Oct. 30, 2014).

166. See Freshwater Crawfish Tail Meat from the People’s Republic of China: Initiation of Antidumping New Shipper Reviews, 79 Fed. Reg. 64,749, 64,749 (Oct. 31, 2014).

167. *China Kingdom*, 917 F.3d at 1359.

168. *Id.*

169. *Id.*

170. *Id.*; see also Freshwater Crawfish Tail Meat from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Returns, 80 Fed. Reg. 60,624, 60,625 (Oct. 7, 2015).

shortly thereafter, the Thai financial statements were eliminated in favor of financial statements from the South African company, Oceana Group.¹⁷¹ Commerce contended that the Thai exporters had benefited from government subsidies, making their financial statements no longer valid for comparison.¹⁷² The new calculation led to dumping margins of 22.16% for China Kingdom, 12.04% for Deyan and 17.23% for Ocean Flavor.¹⁷³

The CIT agreed with Commerce's findings and decision to rely on a second surrogate country after determining that some of the data from the first surrogate had become potentially inaccurate.¹⁷⁴ The exporter appealed to the Federal Circuit and argued that Commerce incorrectly disregarded the financial reports from the Thai producers.¹⁷⁵ Conversely, the Crawfish Processors Alliance, a domestic interested party, argued that the CIT lacked jurisdiction to hear the case in the first instance. The Crawfish Processor Alliance contended that the foreign exporters failed to exhaust their administrative remedies because they failed to raise the objection to the Oceana financial statements during the administrative review.¹⁷⁶

The Federal Circuit's analysis in the *China Kingdom* case yields two valuable takeaways. First, it states that exhaustion of remedies by a petitioner is not required in the absence of a statute mandating such exhaustion.¹⁷⁷ A petitioner must exhaust administrative remedies "where Congress imposes an exhaustion requirement by statute."¹⁷⁸ "But where Congress has not clearly required exhaustion, sound judicial discretion governs."¹⁷⁹ The Court clarified that the exhaustion requirement is not jurisdictional, meaning that failure to exhaust administrative remedies does not necessarily cause a lack of jurisdiction.¹⁸⁰

171. *China Kingdom*, 917 F.3d at 1360.

172. *Id.*

173. Freshwater Crawfish Tail Meat from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Returns, 81 Fed. Reg. 21,840, 21,841 (Apr. 13, 2016).

174. *Weishan Hongda Aquatic Food Co. v. United States*, 273 F. Supp. 3d 1279, 1292–93 (Ct. Int'l Trade 2017), *aff'd*, 917 F.3d 1353 (Fed. Cir. 2019).

175. *China Kingdom*, 917 F.3d at 1361.

176. *Id.* at 1361–62.

177. *Id.* at 1363.

178. *Id.* (quoting *Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 579 (1989)).

179. *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

180. *Id.* ("We clarify that the requirement to exhaust administrative remedies under § 2637(d) is *not* jurisdictional.").

Second, the Court concluded that Commerce did not abuse its discretion in rejecting the Thai financial statements in favor of the South Africa equivalents.¹⁸¹ The Federal Circuit reiterated that Commerce has “broad discretion” in determining what constitutes the best available information for their administrative reviews.¹⁸² In this case, Commerce determined that the Thai companies were receiving export subsidies that affected their financial statements.¹⁸³ The Trade Preferences Extension Act of 2015¹⁸⁴ clearly states that, “[i]n valuing the factors of production,” Commerce “may disregard price or cost values without further investigation if [Commerce] has determined that broadly available export subsidies existed or particular instances of subsidization occurred.”¹⁸⁵ Given the substantial evidence that the Thai companies received subsidies under Thailand’s Investment Promotion Act, the Court concluded that Commerce acted reasonably in disregarding those statements.¹⁸⁶

Another avenue that parties have to seek relief from an AD/CVD order is through a “scope ruling.” A scope ruling is a petition to Commerce to determine whether a particular good should be covered under an existing AD/CVD order or whether it can be excluded.¹⁸⁷ Commerce is authorized to determine “whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.”¹⁸⁸

The procedure adopted for scope rulings has been published as a regulation.¹⁸⁹ An “interested party” initiates the investigation by petitioning the Secretary of Commerce (the “Secretary”) and presenting its case for why a given product should be excluded from an existing AD/CVD order.¹⁹⁰ The Secretary is required to issue a ruling within forty-five days of receipt.¹⁹¹ In complex cases, the Secretary may issue a preliminary ruling, conduct a more thorough investigation, and then issue a final ruling.¹⁹²

181. *Id.* at 1364–65.

182. *Id.* (quoting *QVD Food Co. v. United States*, 658 F.3d 1318, 1323 (Fed. Cir. 2011)).

183. *Id.* at 1365.

184. Pub. L. No. 114-27, §§ 501–507, 129 Stat. 362, 383–87 (2015).

185. § 505(b) (amending 19 U.S.C. § 1677b(c)).

186. *China Kingdom*, 917 F.3d at 1365–66.

187. 19 C.F.R. § 351.225(c) (2019).

188. 19 U.S.C. § 1516a(a)(2)(B)(vi) (2012).

189. *See* 19 C.F.R. § 351.225.

190. § 351.225(c)(1).

191. *See* § 351.225(c)(2).

192. § 351.225(d)–(e).

The Federal Circuit addressed one such scope ruling in the 2019 term, dealing with the case of “curtain wall units.”¹⁹³ That case originated with AD and CVD orders issued against aluminum extrusions from the People’s Republic of China.¹⁹⁴ Shenyang Yuanda Aluminum Industry petitioned Commerce in 2013 to argue that the order does not cover curtain wall units when imported under a contract for an entire curtain wall.¹⁹⁵ Applying its broad statutory discretion in scope determinations, Commerce concluded that the subject merchandise was not excluded from the AD/CVD orders.¹⁹⁶ The CIT upheld Commerce’s conclusion and the Federal Circuit agreed.¹⁹⁷

Scope rulings are useful when it is unclear whether an imported good falls within the language of an AD/CVD Order; however, because petitions for scope rulings are presented to Commerce, CBP lacks the authority to interpret ambiguous language in an AD/CVD Order. This was clarified this term in *Sunpreme Inc. v. United States*.¹⁹⁸ On January 7, 2020, the Federal Circuit granted a petition for rehearing en banc to again address the scope of CBP’s authority and whether such a “suspension may be continued following a scope inquiry by Commerce.”¹⁹⁹ The Federal Circuit reaffirmed its findings that Commerce’s conclusion was valid.²⁰⁰

The AD/CVD Order (the “Order”) in question in this case involved imported solar panels from China. The Order affected imported solar modules utilizing crystalline silicon photovoltaic (CSPV) cells.²⁰¹ The Order excluded certain “thin film photovoltaic products.”²⁰² After the

193. See *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 918 F.3d 1355, 1358 (Fed. Cir. 2019).

194. Aluminum Extrusions from the People’s Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650, 30,650 (May 26, 2011); Aluminum Extrusions from the People’s Republic of China: Countervailing Duty Order, 76 Fed. Reg. 30,653, 30,653 (May 26, 2011).

195. *Shenyang Yuanda Aluminum Indus. Eng’g Co.*, 918 F.3d at 1357–58.

196. *Id.* at 1358.

197. *Id.*

198. *Sunpreme II CAFC*, 924 F.3d 1198, 1214 (Fed. Cir. 2019), *vacated en banc*, 946 F.3d 1300 (2020).

199. *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1303 (Fed. Cir. 2020) (en banc).

200. *Id.* at 1322.

201. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Countervailing Duty Order, 77 Fed. Reg. 73,017, 73,017 (Dec. 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018, 73,018 (Dec. 7, 2012).

202. *Sunpreme II CAFC*, 924 F.3d at 1201.

Order was published in 2012, Sunpreme imported its solar modules under the entry type “01,” which indicated that it was not subject to the Order.²⁰³ CBP did not object to this entry type until 2015, when CBP *sua sponte* determined that the imported solar modules were in fact subject to the Order and would thus be subject to a cash bond and a suspension of liquidation.²⁰⁴

CBP was uncertain about the language in the Order, so it reached out to Commerce to clarify the language in June 2015. Commerce responded by informing CBP that the proper mechanism to determine whether a good falls within an AD/CVD Order is for the importer to file a request for a scope review.²⁰⁵ Sunpreme challenged CBP’s determination at the CIT, and the CIT explained that the language in the Order regarding what “thin film” means is ambiguous, but that it is not within the authority of CBP to interpret that language.²⁰⁶ The Federal Circuit reversed that decision on the grounds that the CIT lacked jurisdiction to hear a direct challenge from CBP when another administrative remedy—namely, a scope ruling—was available.²⁰⁷

Sunpreme went back to Commerce in 2015 to request a scope ruling, which Commerce initiated in December 2015.²⁰⁸ In conducting a scope ruling that requires interpretation of ambiguous language, Commerce follows two sets of sources: the first set of sources includes the scope language contained in the order itself, “[t]he descriptions contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] (including prior scope determinations) and the [ITC].”²⁰⁹ These are called the “(k)(1)” sources.²¹⁰ If those sources do not address the ambiguity in question, Commerce turns to the (k)(2) sources, which include “the product’s physical characteristics, ultimate purchasers’ expectations, the ultimate use of the product, trade channels in which the product is sold, and the manner in which the product is advertised and displayed.”²¹¹

203. *Id.* at 1202.

204. *Id.*

205. Sunpreme Inc. v. United States (“*Sunpreme I CIT*”), 190 F. Supp. 3d 1185, 1192 (Ct. Int’l Trade 2016).

206. *Id.* at 1194–95.

207. See Sunpreme Inc. v. United States (“*Sunpreme I CAFC*”), 892 F.3d 1186, 1192–94 (Fed. Cir. 2018).

208. *Sunpreme II CAFC*, 924 F.3d at 1203.

209. 19 C.F.R. § 351.225(k)(1).

210. *Sunpreme II CAFC*, 924 F.3d at 1203.

211. *Id.*

In this case, Commerce relied on the (k)(2) sources to conclude that the Sunpreme solar modules, which were not clearly included but also not clearly excluded from the AD/CVD Order, were in fact covered by that Order.²¹² It found that the mere presence of thin film did not exclude the modules from the Order, and that they functioned as other CSPV modules, which were subject to the Order.²¹³ Commerce instructed CBP to continue suspending liquidation of the imported goods.²¹⁴

Upon challenge by Sunpreme, the CIT concluded that Commerce made a reasonable determination regarding the inclusion of the imported solar modules within the AD/CVD Order.²¹⁵ However, the CIT also concluded that Commerce inappropriately ordered CBP to continue suspending liquidation because that original suspension was *ultra vires*.²¹⁶ Commerce only has the authority to continue a lawful suspension.²¹⁷

The Federal Circuit, in upholding the CIT decision on both counts, made very clear that the roles of Commerce and CBP in AD/CVD investigations and determinations are quite distinct. While Commerce has the authority to interpret, through scope rulings, whether certain goods fall within its own orders, CBP has merely “ministerial duties” to apply the determinations made by Commerce.²¹⁸ “We also recognized the superior institutional competence of Commerce over Customs for antidumping and countervailing duty matters in *Mitsubishi Electronics*, noting Customs’ merely ministerial duties, and holding that “Customs cannot ‘modify . . . [Commerce’s] determinations, their underlying facts, or their enforcement.’”²¹⁹ The Federal Circuit further reasoned that Commerce may only suspend liquidation of entries after a scope inquiry has concluded, “and thus “retroactive authorization of suspension of liquidation is prohibited.”²²⁰

It should be noted that this decision included extensive analysis by the majority as well as a strong dissent regarding the cross-appeal by

212. *Id.* at 1204.

213. *Id.*

214. *Id.*

215. Sunpreme Inc. v. United States (“*Sunpreme II CIT*”), 256 F. Supp. 3d 1265, 1276 (Ct. Int’l Trade 2017).

216. *Id.* at 1291–92, 1294.

217. *Id.* at 1293.

218. *Sunpreme II CAFC*, 924 F.3d at 1213.

219. *Id.*; *see also id.* at 1215 (“The scope inquiry in this case, answered by Commerce’s interpretation of the duty order, proves beyond cavil that the duty order here is ambiguous. Only at the conclusion of the scope inquiry could it be said that Sunpreme’s solar modules fall within the scope of an ambiguous duty order.”).

220. *Id.* at 1213–14.

the United States over the continuation of suspension of liquidation.²²¹ The dissent agreed with the majority that CBP has only ministerial duties whereas it is up to Commerce to interpret the Orders that it issues.²²² However, Judge Prost suggested that CBP has the authority to examine imports and apply Orders as appropriate based upon their own findings of fact,²²³ an interpretation that the Federal Circuit dispelled in its recent en banc opinion.²²⁴ The dissenting opinion continued to suggest that the majority opinion would incentivize importers not to request scope inquiries where CBP is failing to apply AD/CVD Orders to their goods.²²⁵

There are, of course, a multitude of ways in which an antidumping order can be modified, such as through the five-year sunset review process, a petition from an importer, or an order from the CIT. In the case of *BMW of North America LLC v. United States*,²²⁶ which discussed importing ball bearings from the United Kingdom, Commerce and the CIT bounced back and forth over the need to maintain the Order during the sunset review, ultimately terminating the Order, and then reinstating it.²²⁷ This unusual process left BMW in the unfortunate position of uncertainty over whether it was subject to an Order affecting its imports.

The *BMW* case began with a May 2011 request for administrative reviews of a 1989 AD/CVD Order on ball bearing imports from France, Germany, Italy, Japan and the United Kingdom, posted by Commerce.²²⁸ BMW timely submitted a request for review.²²⁹ At the same time, the same Order was undergoing a five-year sunset review.²³⁰ The sunset review resulted in the ITC finding a continuation of material injury to a domestic industry and thus maintaining a domestic injury. The CIT, however, vacated and remanded that decision several times between 2006 and 2011, ultimately leading the ITC to determine that there would likely not be a material injury if the Order were

221. *See id.* at 1216 (Prost, C.J., dissenting in part).

222. *Id.* at 1218–19.

223. *See id.* (citing *Xerox Corp. v. United States*, 289 F.3d 792, 794 (Fed. Cir. 2002)).

224. *Sunpreme Inc. v. United States*, 946 F.3d 1300, 1317 (Fed. Cir. 2020) (en banc).

225. *Sunpreme II CAFC*, 924 F.3d at 1219.

226. 926 F.3d 1291 (Fed. Cir. 2019).

227. *Id.* at 1291, 1294–95.

228. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 76 Fed. Reg. 24,460, 24,460 (May 2, 2011).

229. *BMW*, 926 F.3d at 1294.

230. *Id.* at 1294.

discontinued.²³¹ Commerce published notice in the Federal Register of the termination of the AD Order and notified parties with pending administrative reviews that those reviews would be “discontinue[d].”²³²

The Federal Circuit reversed the CIT’s decision that led to the termination of the Order in 2013 and, thus, reinstated the Order.²³³ Accordingly, Commerce electronically notified all of the parties that had previously submitted administrative review requests and asked them to submit a quantity and value questionnaire to determine the most applicable and appropriate dumping margin.²³⁴ BMW did not respond, arguing later that the time lapse and confusion over the existence of the Order left it unaware that it was required to respond.²³⁵ Ultimately, Commerce applied an adverse facts available rate, which is utilized when an importer subject to an administrative review fails to respond to a request for information. The failure to respond led Commerce to determine a rate on its own, which tends to be a higher rate than would otherwise have been applied.

D. Liquidation of Entries

The CBP’s final act in settling its accounts for imports subject to antidumping or countervailing duty orders is liquidation, whereby the final rate that has been established is applied to the entries and charged to the importer.²³⁶ Assuming no adjustments are made along the way, liquidation usually happens at the estimated duty amount that the importer initially paid to receive their goods.²³⁷

However, when goods are subject to an antidumping or countervailing duty order, or otherwise stuck in litigation, liquidation often takes place long after the goods arrive at the port of entry.²³⁸ While these legal challenges work their way up and down the courts, the goods are released to the importer, who pays estimated duties on those goods.²³⁹ If the liquidated amount is higher than the estimated duties, the importer is

231. *Id.*

232. Ball Bearings and Parts Thereof from Japan and the United Kingdom: Revocation of Antidumping Duty Orders, 76 Fed. Reg. 41,761, 41,762 (July 15, 2011).

233. *NSK Corp. v. U.S. Int’l Trade Comm’n*, 716 F.3d 1352, 1369 (Fed. Cir. 2013).

234. *BMW*, 926 F.3d at 1295.

235. *Id.* at 1295–96.

236. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-542, ANTIDUMPING AND COUNTERVAILING DUTIES: CBP ACTION NEEDED TO REDUCE DUTY PROCESSING ERRORS AND MITIGATE NONPAYMENT RISK 6–7 (2016).

237. *Id.* at 7.

238. *Id.* at 7 n.18.

239. *Id.* at 6.

billed for the difference. Likewise, if the liquidated amount is lower, the importer will receive a refund of duties paid.

While undergoing an AD/CVD investigation, if Commerce or a court decides to adjust the duty rate under an existing AD/CVD order, they are required by law to issue a *Timken*²⁴⁰ notice, alerting the party that the duty rate will change.²⁴¹ That notice must be issued within ten days of a court decision to change the duty amount.²⁴² The new duty may not be applied retroactively; however, all entries of goods after the date of the *Timken* notice are subject to the new duty rate.

The case of *Sumecht NA, Inc. v. United States*²⁴³ challenged some aspects of these notices.²⁴⁴ This case addressed an antidumping duty order on crystalline silicon photovoltaic cells imported from China.²⁴⁵ Note that a parallel case, relevant here, addressed countervailing duties on these same imports.²⁴⁶ In Commerce's 2012 final antidumping determination for these imports, it established a China-wide rate of 249.96%, but gave Sumecht, d/b/a Sumec, a separate rate of 24.48%, which was later lowered to 13.18% due to a World Trade Organization decision.²⁴⁷ Commerce's determination was challenged and, following a voluntary remand, Commerce decided that Sumec no longer qualified for a separate rate due to a concern for consistency with recent rulings.²⁴⁸

As noted above, any time the courts decide to change an existing duty rate, Commerce must issue a *Timken* notice to make the parties aware of the change. This notice must be issued within ten days of that court decision. In this case, Commerce issued their notice forty-nine days after the CIT's decision in *Jiangsu Jiasheng*,²⁴⁹ which mandated the

240. *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990).

241. *Id.* at 341.

242. *Id.*

243. *Sumecht NA, Inc. v. United States*, 923 F.3d 1340 (Fed. Cir. 2019).

244. *Id.* at 1344.

245. *Id.* at 1343.

246. *Id.* at 1346.

247. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73,018, 73,021 (Dec. 7, 2012); Implementation of Determinations Under section 129 of the Uruguay Round Agreements Act, 80 Fed. Reg. 48,812, 48,818 (Aug. 14, 2015).

248. *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1267 (Ct. Int'l Trade 2015).

249. *Sumecht*, 923 F.3d at 1344.

redetermination of the rate for Sumec.²⁵⁰ Commerce retroactively dated that notice with the date of October 15, 2015, and instructed CBP to begin liquidating entries for the period October 15 through November 23, 2015. Sumec challenged that decision on the grounds that the *Timken* notice had not been properly issued.²⁵¹

Sumec sought a preliminary injunction to prevent CBP from liquidating entries for the subject period at the higher duty rate. A court will grant a preliminary injunction if the movant can show “(1) likelihood of success on the merits, (2) irreparable harm absent immediate relief, (3) the balance of interests weighing in favor of relief, and (4) that the injunction serves the public interest.”²⁵² The CIT previously denied Sumec’s motion on the ground that it had not shown the likelihood of irreparable harm since the liquidation had already been enjoined in the parallel countervailing duty case.²⁵³ The Federal Circuit agreed and found no reason to depart from this decision.²⁵⁴

It should be noted that, subsequent to this decision, the case returned to the CIT for a hearing on the merits of the improper *Timken* notice.²⁵⁵ In that case, Judge Choe-Groves opined that Commerce is required to issue the *Timken* notice within ten days of the court decision adjusting duty rates; that Commerce may not remedy a late notice by making such notice retroactive; and that Commerce retroactively increasing the duty amount is not harmless error.²⁵⁶ While that decision is likely to be appealed to the Federal Circuit Court of Appeals, it would appear as of the time of this writing that Commerce may be held to a higher standard when issuing *Timken* notices in the future.

250. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, From the People’s Republic of China: Notice of Court Decision Not in Harmony with Final Determination of Investigation and Amended Final Determination of Investigation Pursuant to Court Decision, 80 Fed. Reg. 72,950, 72,950 (Nov. 23, 2015).

251. *Sumecht*, 923 F.3d at 1344.

252. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

253. *Sumecht*, 923 F.3d at 1346.

254. *Id.* at 1347.

255. *Sumecht NA, Inc. v. United States*, 399 F. Supp. 3d 1370, 1372 (Ct. Int’l Trade 2019).

256. *Id.* at 1377, 1379.

CONCLUDING REMARKS

A significant number of trade cases at the Federal Circuit this year involved classification issues. And of those, several revolved around the proper definition of the good, from door knobs to passenger vans. The Federal Circuit emphasized, once again, the difference between *eo nomine* and use definitions of objects. The former refers to a commonly understood object—such as a wrench—that is defined by its name rather than its intended use. A “use” definition, on the other hand, is best understood as an object that is defined by how it is intended to be used. The difference was highlighted by two cases this term: *Irwin*, which classified wrenches and pliers as *eo nomine* regardless of their final intended use.²⁵⁷ On the other hand, in the *Ford* case, the Federal Circuit found that when use is implied in a common term, such as cargo van, that use should be examined when classifying the good.²⁵⁸

In the dumping arena, a variety of issues were covered this year, from the proper determination of country of origin and Commerce’s discretion in making that determination²⁵⁹ to the ability of Commerce to reinstate an AD/CVD order that it had discontinued.²⁶⁰ One of the key cases in this area this year was the *China Kingdom* case, which involved the selection of a surrogate country to assess financial statements in a case involving a nonmarket economy.²⁶¹ In that case, the Federal Circuit concluded that Commerce had broad discretion to choose where to source its information in dumping determinations involving nonmarket economies.²⁶²

The forthcoming term at the Federal Circuit will likely be even more contentious as the court tackles an appeal over the use of section 232 of the Trade Expansion Act of 1962 to block the entry of steel and aluminum imports under the auspice of national security.²⁶³ This important case questions the ability of Congress to delegate its trade

257. *Irwin Indus. Tool Co. v. United States*, 920 F.3d 1356, 1360 (Fed. Cir. 2019).

258. *Ford Motor Co. v. United States*, 926 F.3d 741, 751, 753 (Fed. Cir. 2019) (leading the Federal Circuit to reverse the CIT and remand to examine the ultimate use of imported vans).

259. *Canadian Solar Inc. v. United States*, 918 F.3d 910, 918 (finding that Commerce has broad discretion to depart from normal practices).

260. *BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1302 (Fed. Cir. 2019) (finding that Commerce has broad discretion to reinstate orders that had been discontinued).

261. *Weishan Hongda Aquatic Food Co. v. United States (China Kingdom)*, 917 F.3d 1353, 1360 (Fed. Cir. 2019).

262. *Id.* at 1364–65.

263. *Am. Inst. for Int’l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1337 (Ct. Int’l Trade 2019).

powers to the President and whether doing so violates the nondelegation doctrine. The CIT upheld the authority of Congress to make such a delegation on the basis of precedent established by the 1976 *Algonquin* case.²⁶⁴ However, the judges in the CIT decision questioned the validity of that precedent given the current application of section 232 tariffs.²⁶⁵ It will be up to the Federal Circuit to determine the validity of that delegation, and it will likely do so during the 2019 to 2020 term. Stay tuned.

264. *Id.* at 1340 (citing *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 559–60 (1976)).

265. *Id.* at 1346–47.