

**A DISCUSSION OF 2009 AND 2010 CASES DECIDED  
UNDER THE UNITED STATES COURT OF  
INTERNATIONAL TRADE'S 28 U.S.C. § 1581(a)  
JURISDICTION**

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*This article discusses the substantive decisions made by the U.S. Court of International Trade (CIT) pursuant to its 28 U.S.C. § 1581(a) jurisdiction in 2009 and 2010.*

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I. INTRODUCTION

Over the last two years, the United States Court of International Trade's (CIT) decisions in § 1581(a) cases have addressed a number of issues concerning filing requirements, attorney's fees, and classification. This article is intended to address some of the practical concerns of regular customs practitioners and litigants regarding the U.S. Court of International Trade's recent handling of cases resulting from the denial of an administrative protest. Some of the cases that were selected for discussion in this article were chosen because they addressed filing issues or technical aspects of litigation before this specialized court. Still others were chosen as a consequence of recent trends in classification litigation—specifically classification reversals in cases appealed to the U.S. Court of Appeals for the Federal Circuit (CAFC).

Importers adversely affected by U.S. Customs and Border Protection's (CBP or Customs) actions against their import transactions are entitled to judicial review before the CIT.<sup>1</sup> Pursuant to 28 U.S.C. § 1581(a), the CIT has exclusive jurisdiction over any civil action commenced to contest the denial of an administrative protest, whether in whole or in part, by Customs. While the geographical jurisdiction of the CIT extends throughout the United States, the court's subject matter jurisdiction is limited.<sup>2</sup> Thus, in order for the court to have jurisdiction over a claim under § 1581(a), Customs' decision must have

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1. The CIT is an Article III, federal district court. It consists of nine judges as well as active senior judges. The judges of the CIT have the same authority as other federal district court judges. 28 U.S.C. § 1585 (2006).

2. *Id.* §§ 1581-85.

been challenged through a valid administrative protest.<sup>3</sup>

## II. OVERVIEW OF THE CIT'S 2009–2010 CASELAW

The CIT issued 152 slip opinions in 2009 and 142 slip opinions in 2010. However, of those decisions, the CIT only issued a total of thirty-five dispositive decisions that invoked the court's jurisdiction under 28 U.S.C. § 1581(a). In instances where 28 U.S.C. § 1581(a) was invoked, the majority of these decisions involved an importer's challenge to Customs' protest decisions as to the classification of imported merchandise.

During 2009 and 2010, the issues litigated by importers under 28 U.S.C. § 1581(a) were primarily legal (and not factual) and therefore most of the cases were decided on motions for summary judgment without the necessity of a trial or an evidentiary hearing. In analyzing the seventeen dispositive cases decided under the CIT's § 1581(a) jurisdiction in 2009, twelve of the cases were dispatched on motions for summary judgment. Of these twelve cases: nine dealt with the proper classification of imported goods;<sup>4</sup> two involved issues regarding the proper value or fees charged by Customs;<sup>5</sup> and the final case involved drawback.<sup>6</sup> Of the five remaining dispositive decisions, four were orders or opinions issued to conform to CAFC reversals and remands, and the final case was a judgment order rendered after trial on a value issue.

As for the eighteen dispositive holdings in 2010 that were made

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3. *See, e.g.*, *Novell, Inc. v. United States*, 21 Ct. Int'l Trade 1141, 1142 (1997) (explaining that the CIT's jurisdiction under 28 U.S.C. § 1581(a) is limited to those civil actions that contest the denial, either in whole or in part, of a protest).

4. *Outer Circle Prods. v. United States*, 602 F. Supp. 2d 1294 (Ct. Int'l Trade 2009), *rev'd*, 590 F.3d 1323 (Fed. Cir. 2010); *Global Sourcing Grp., Inc. v. United States*, 611 F. Supp. 2d 1367 (Ct. Int'l Trade 2009); *May Food Mfg. v. United States*, 616 F. Supp. 2d 1349 (Ct. Int'l Trade 2009); *Honda of Am. Mfg., Inc. v. United States*, 625 F. Supp. 2d 1324 (Ct. Int'l Trade 2009); *Archer Daniels Midland Co. v. United States*, 31 I.T.R.D. (BNA) 2152 (Ct. Int'l Trade 2009); *Photonetics, Inc. v. United States*, 659 F. Supp. 2d 1317 (Ct. Int'l Trade 2009); *ENI Tech., Inc. v. United States*, 641 F. Supp. 2d 1337 (Ct. Int'l Trade 2009); *storeWALL, LLC v. United States*, 675 F. Supp. 2d 1200 (Ct. Int'l Trade 2009), *rev'd*, 644 F.3d 1358 (Fed. Cir. 2011); *Arko Foods Int'l v. United States*, 679 F. Supp. 2d 1369 (Ct. Int'l Trade 2009).

5. *Cont'l Teves, Inc. v. United States*, 31 I.T.R.D. (BNA) 1735 (Ct. Int'l Trade 2009); *P.R. Towing & Barge Co. v. United States*, 637 F. Supp. 2d 1266 (Ct. Int'l Trade 2009).

6. *Delphi Petroleum, Inc. v. United States*, 717 F. Supp. 2d 1340 (Ct. Int'l Trade 2010); Drawback refers to a Customs refund of ninety-nine percent of the duties paid on an imported product when it is exported or used to produce a product that is exported. 19 U.S.C. § 1313 (2006).

pursuant to the CIT's § 1581(a) jurisdiction, similar to the prior year, twelve of the cases were decided on motions for summary judgment. Of these twelve cases: nine decisions dealt with the proper classification of imported goods;<sup>7</sup> two involved issues regarding the proper value or fees charged by Customs;<sup>8</sup> and the final case involved CBP's alleged revocation of an administrative ruling and a classification issue.<sup>9</sup> Of the six remaining dispositive decisions: three were on procedural or jurisdictional grounds granting the government's motions to dismiss;<sup>10</sup> one was an opinion issued after remand to CBP;<sup>11</sup> and the final one regarded an application for attorney's fees and costs.<sup>12</sup>

As can be seen from the above analysis, the majority of the decisions issued in the past two years involve issues relating to the proper classification of imported merchandise. This article will briefly address some of the more interesting jurisdictional and procedural dispositive decisions of 2009 and 2010 and then discuss the more significant classification decisions. The classification cases that were selected for discussion in this article were chosen in order to clarify and address the growing trend by the CIT to make a rigid classification paradigm and the CAFC's reversal under the "common commercial meaning doctrine" or for practical commercial reasons. The following sections address specific CIT filing requirements. Part III addresses cases clarifying jurisdictional requirements. Parts IV and V discuss classification cases decided by the CIT in 2009 and 2010 that were subsequently reversed by the CAFC. Finally, Part VI discusses commonalities among

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7. *Aromont USA, Inc. v. United States*, 32 I.T.R.D. (BNA) 1815 (Ct. Int'l Trade 2010); *Lemans Corp. v. United States*, 675 F. Supp. 2d 1374 (Ct. Int'l Trade 2010); *BenQ Am. Corp. v. United States*, 683 F. Supp. 2d 1335 (Ct. Int'l Trade 2010), *rev'd*, 646 F.3d 1371 (Fed. Cir. 2011); *CamelBak Prods., LLC v. United States*, 704 F. Supp. 2d 1335 (Ct. Int'l Trade 2010), *rev'd*, 649 F.3d 1361 (Fed. Cir. 2011); *Sparks Belting Co. v. United States*, 715 F. Supp. 2d 1305 (Ct. Int'l Trade 2010); *BP Prods. N. Am., Inc. v. United States*, 716 F. Supp. 2d 1291 (Ct. Int'l Trade 2010); *Dell Prods. LP v. United States*, 714 F. Supp. 2d 1252 (Ct. Int'l Trade 2010); *Pacific Nw. Equip. v. United States*, 715 F. Supp. 2d 1319 (Ct. Int'l Trade 2010); *Applied Biosystems v. United States*, 715 F. Supp. 2d 1327 (Ct. Int'l Trade 2010); *Citizen Watch Co. of Am. v. United States*, 724 F. Supp. 2d 1316 (Ct. Int'l Trade 2010).

8. *Horizon Lines, LLC v. United States*, 752 F. Supp. 2d 1305 (Ct. Int'l Trade 2010); *Ford Motor Co. v. United States*, 744 F. Supp. 2d 1367 (Ct. Int'l Trade 2010).

9. *Canex Int'l Lumber Sales Ltd. v. United States*, 32 I.T.R.D. (BNA) 1705 (Ct. Int'l Trade 2010).

10. *All Tools, Inc. v. United States*, 32 I.T.R.D. (BNA) 2041 (Ct. Int'l Trade 2010); *FAG Holdings v. United States*, 744 F. Supp. 2d 1353 (Ct. Int'l Trade 2010); *Great Am. Ins. Co. of N.Y. v. United States*, 710 F. Supp. 2d 1346 (Ct. Int'l Trade 2010).

11. *Peerless Clothing Int'l v. United States*, 683 F. Supp. 2d 1348 (Ct. Int'l Trade 2010).

12. *Delphi Petroleum, Inc. v. United States*, 717 F. Supp. 2d 1340 (Ct. Int'l Trade 2010).

the classification cases reversed by the CAFC.

### III. JURISDICTION UNDER 28 U.S.C. § 1581(A)

Since passage of the Customs Court Act of 1980,<sup>13</sup> importers have regularly invoked § 1581(a) to contest adverse decisions made by Customs before the CIT. Pursuant to 19 U.S.C. § 1514 (§ 515 of the Tariff Act of 1930), an importer may file an administrative protest against a final agency decision made by CBP as to:

- (1) the appraised value<sup>14</sup> of merchandise imported into the United States;
- (2) CBP's classification<sup>15</sup> and rate and amount of duties chargeable on imported goods;
- (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
- (4) CBP's exclusion<sup>16</sup> of merchandise from entry<sup>17</sup> or delivery or a demand for a products redelivery to customs custody;
- (5) the liquidation<sup>18</sup> or reliquidation of any entry;

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13. The Customs Court Act of 1980 is the most recent action by Congress with respect to customs and international trade litigation. This Act expanded the jurisdiction of the CIT, which had previously been referred to as the Customs Court. 28 U.S.C. §§ 1581-85 (2006).

14. The "value" of imported merchandise is determined by statute. 19 U.S.C. § 1401a(b) (2006). Most merchandise entered into the United States is appraised based on the price actually paid for the merchandise plus: (1) packing costs; (2) selling commissions incurred by the buyer; (3) the value of any assists (anything the buyer provided to the seller free of charge or at reduced cost) in order to produce or manufacture the imported merchandise; (4) royalty fees which the buyer had to pay as a condition of sale; and (5) the proceeds of any resale that accrued to the seller. *Id.* § 1401a(b); *see also* 19 C.F.R. § 152.103 (2011). This method of appraisal is referred to as the transaction value. *Id.*

15. "Classification" is the process of selecting the provision in the Harmonized Tariff Schedule of the United States (HTSUS) that most specifically describes the imported merchandise. 19 U.S.C. § 1202; *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the HTSUS is a statute, but is not published physically in the United States Code). The HTSUS is divided into sections, chapters and headings that describe the products and commodities. It also consists of General Notes, General Rules of Interpretation (GRIs), and Additional U.S. Rules of Interpretation (ARIs). The classification of goods imported into the United States is governed by these GRIs, which are applied in numerical order. 19 U.S.C. § 1202.

16. Pursuant to 19 U.S.C. § 1592(c)(11) (Supp. II 2008), CBP may prevent goods or merchandise from entering the commerce of the United States.

17. When goods arrive in the United States, they must be "entered" by an importer or his agent. 19 C.F.R. § 141.4(a). "Entry" requires the filing of the appropriate documents and forms with CBP so as to permit the agency to determine whether the merchandise is admissible and may be released by Customs custody into the commerce of the United States. *Id.* § 141.0a(a).

18. "Liquidation" is the final ascertainment of duties and other issues involved in an entry. *Id.* § 159.1.

- (6) the refusal to pay a claim for drawback; or
- (7) Customs' refusal to reliquidate an entry.

Thus, it is the agency's denial of an importer's protest, whether in whole or in part, that gives rise to an importer's right to commence an action in the CIT pursuant to 28 U.S.C § 1581(a).<sup>19</sup>

A. *Clarification of Summons Requirements under § 1581(a)*

Section 1581(a) actions are commenced by filing a summons with the CIT. In 2010, two cases discussed the CIT's § 1581(a) summons filing requirements. In *Great American Insurance Co. v. United States (GAIC)*<sup>20</sup> and *All Tools, Inc. v. United States*,<sup>21</sup> the importers' failure to comply with the CIT's jurisdictional prerequisites was a jurisdictional bar to the court hearing the cases on their merits. What these two cases have in common is the strict construction that the CIT gives to administrative prerequisites. In *GAIC*, the CIT discussed the payment of duties requirement, and in *All Tools* the court discussed timing requirements.

1. *Great Am. Ins. Co. v. United States (GAIC)*

In *GAIC*, the importer challenged the denial of a protest by filing a summons with the CIT.<sup>22</sup> On the same day that *GAIC* filed its summons, it mailed the full bond<sup>23</sup> amount of \$50,000 to Customs.<sup>24</sup> The government alleged that jurisdiction was lacking because *GAIC* did not pay all duties prior to commencing the action as required by 28 U.S.C. § 2637.<sup>25</sup> Section 2637(a) states that "regarding any civil actions contesting the denial of a protest" under 19 U.S.C. § 1515, those actions can be brought before the CIT only if "all liquidated duties, charges, or exactions have been paid at the time the action is commenced." Pursuant to United States Court of International Trade (USCIT) Rule

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19. It is worth noting that the failure to identify all of the administrative protest numbers in the summons is also considered to be a jurisdictional defect. *Daimler Chrysler Corp. v. United States*, 442 F.3d 1313 (Fed. Cir. 2006). The CIT rules, however, permit a summons to be amended to add protest numbers so long as there is no material prejudice to other parties. U.S. Ct. INT'L TRADE R. 3(e) (2009).

20. 710 F. Supp. 2d 1346 (Ct. Int'l Trade 2010).

21. 32 I.T.R.D. (BNA) 2041, 2047 (Ct. Int'l Trade 2010).

22. *Great Am.*, 710 F. Supp. 2d at 1348.

23. Bond application and approval is required in order to protect any revenue that may be owed to Customs from import transactions. 19 C.F.R. § 113.11.

24. *Great Am.*, 710 F. Supp. 2d at 1348.

25. *Id.*

3(a)(1), an action is “commenced” when the summons is filed with the Clerk of Court. Additionally, when a document is mailed by certified or registered mail, USCIT Rule 5(e) specifies that it is “deemed filed as of the date of mailing.”

The government claimed that GAIC filed the summons prior to Customs receiving the full payment of duties, “since certified or registered mail is deemed filed as of the date of the mailing and payments to Customs are credited on the date payment is received.”<sup>26</sup> Accordingly, the government claimed that the statutory requisites had not been met.<sup>27</sup> In response, GAIC argued that pursuant to USCIT Rules 3 and 5, it should be allowed its day in court and, thus, should be able to amend its summons to cure the jurisdictional defect.<sup>28</sup>

The CIT held that importers could not “cherry pick” parts of statutes and rules that result in their favor.<sup>29</sup> Both the statute and USCIT Rules 3(a)(1) and 5(e) establish that the date on which a summons is mailed qualifies as the date of filing for the purposes of commencing an action before the CIT.<sup>30</sup> Applying Customs regulation 19 C.F.R. § 24.2a(c)(5), that payment is credited when received, in this case GAIC’s payment to CBP was not received until two days after the summons was filed.<sup>31</sup> The CIT explained that the case law regarding § 2637 unambiguously held that the requirements of that statute must be strictly applied.<sup>32</sup> Accordingly, the case was dismissed.

## 2. *All Tools, Inc. v. United States*

In *All Tools*, the government moved for summary judgment alleging that the plaintiff importer failed to file its summons in a timely manner pursuant to 28 U.S.C. § 2636(a)(1) (2006) and therefore failed to establish jurisdiction.<sup>33</sup> *All Tools* argued that the deadline for filing its suit was equitably tolled pending Customs’ issuance of a protest number, and therefore its suit was timely.<sup>34</sup>

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26. *Id.*; see also 19 C.F.R. § 24.3a(c)(5).

27. *Great Am.*, 710 F. Supp. 2d at 1348.

28. *Id.* at 1348-49.

29. *Id.* at 1350.

30. 28 U.S.C. § 2636(c) (2006).

31. *Great Am.*, 710 F. Supp. 2d at 1350.

32. *Id.* at 1350-51.

33. *All Tools v. United States*, 32 I.T.R.D. (BNA) 2041, 2043 (Ct. Int’l Trade 2010).

34. *Id.* at 2044.

Plaintiff, through its customs broker,<sup>35</sup> had entered a shipment of painting accessories.<sup>36</sup> The broker completed the entry documents and claimed that the entry included paint brushes classified as “Natural Bristle Brushes.”<sup>37</sup> Following the filing of the entry documents, Customs concluded that because the paint brushes had natural bristles they fell within the scope of an antidumping duty order and therefore were subject to an unfair trade duty of 351.92%.<sup>38</sup> Customs sent an administrative Notice of Action<sup>39</sup> to the broker stating that the plaintiff’s paint brushes were subject to this antidumping duty.<sup>40</sup> Neither the broker nor All Tools responded to the Notice of Action.<sup>41</sup> Customs then liquidated the entry and assessed the increased duty rate.<sup>42</sup>

As a consequence of a number of administrative and procedural errors on the part of both parties, plaintiff failed to file timely protests and a timely summons. However, plaintiff claimed that the court had jurisdiction because the deadline for filing the summons was equitably tolled. The court explained that equitable tolling is generally limited to situations either where a claimant “has been ‘induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass’” or “where a claimant has actively pursued judicial relief by filing a defective pleading within the statutory time period.”<sup>43</sup> In order to assert equitable tolling, the claimant must show that it has been diligent in preserving its legal rights.<sup>44</sup>

Therefore, the court held that because All Tools was not prevented from filing its case, either by the defendant’s inaction or otherwise, equitable tolling was not available to it. The court also determined that the plaintiff had failed to demonstrate diligence so as to justify equi-

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35. A customs broker is “a person licensed . . . to transact customs business on behalf of others.” 19 C.F.R. § 111.1 (2011).

36. *All Tools*, 32 I.T.R.D. (BNA) at 2041.

37. *Id.* at 2042.

38. *See* Natural Bristle Paint Brushes and Brush Heads from the People’s Republic of China, 61 Fed. Reg. 52,917, 52,918 (Oct. 9, 1996).

39. A Customs port director may request modifications and additional duties on merchandise previously released from Customs custody. 19 C.F.R. § 152.2.

40. *All Tools*, 32 I.T.R.D. (BNA) at 2042.

41. *Id.*

42. *Id.*

43. *Id.* at 2046 (citing *Former Emps. of Siemens Info. Commc’n Networks, Inc. v. Herman*, 120 F. Supp. 2d 1107, 1114 (Ct. Int’l Trade 2000) (internal citations omitted)).

44. *Id.*; *see also* *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (“We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”).

table tolling. Therefore, the court determined that it did not have jurisdiction under 19 U.S.C. § 1581 (a) to hear the plaintiff's claims.

B. *Clarification of Pleading Requirements under § 1581(a)*

The plaintiff importer in *FAG Holding Corp. v. United States*<sup>45</sup> brought suit pursuant to 19 U.S.C. § 1514 challenging the liquidation of two entries by CBP.<sup>46</sup> The government moved to dismiss for failure to state a claim under USCIT Rule 12(b)(5). This case involved a somewhat rare application of the Supreme Court cases *Twombly*<sup>47</sup> and *Iqbal*<sup>48</sup> by the CIT, which require more than a mere notice pleading by a party, resulting in the plaintiff's case being dismissed.

The entries at issue in this case were subject to an antidumping duty order by the United States Department of Commerce (Commerce).<sup>49</sup> CBP liquidated plaintiff's entries in 2001 and assessed an antidumping duty rate of 25.62% *ad valorem*.<sup>50</sup> The plaintiff protested the liquidation of the entries, which Customs subsequently denied in 2006.<sup>51</sup> Plaintiff then filed a summons in a timely manner, seeking reliquidation on the ground that, under 19 U.S.C. § 1504(d), the subject entries were deemed liquidated by law prior to the 2001 liquidation date. The defendant moved to dismiss, arguing that the plaintiff's complaint contained insufficient facts to plausibly support its claim.<sup>52</sup>

The court explained that under ordinary circumstances, Customs has up to one year from the "date of entry" to effect liquidation.<sup>53</sup> However, in order to preserve the rights of the parties in certain situations, liquidation may be suspended by court order or during an

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45. 744 F. Supp. 2d 1353 (Ct. Int'l Trade 2010).

46. *Id.* at 1355.

47. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . ." (citations omitted) (internal quotation marks omitted)).

48. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (explaining that a complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face).

49. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof from the Federal Republic of Germany*, 54 Fed. Reg. 20,900 (May 15, 1989).

50. *Ad valorem* is Latin for "according to the value." An *ad valorem* duty rate is the percentage of the value of the imported goods owed to the government by the importer.

51. *FAG Holdings*, 744 F. Supp. 2d at 1355.

52. *Id.* at 1356.

53. 19 U.S.C. § 1504(a) (2006); 19 C.F.R. § 159.11 (2011).

administrative review of an antidumping duty order.<sup>54</sup> Once the review is completed, Commerce provides notice that the suspension has been removed, and 19 U.S.C. § 1504(d) grants Customs six months to liquidate the entry. If Customs fails to do so, the unliquidated entry is deemed liquidated by operation of law at the rate of duty asserted by the importer in the entry documentation.<sup>55</sup>

The plaintiff's documents showed that its entries were imported pursuant to a special permit for immediate delivery; however, the court found that applying the standard set forth in *Twombly* and *Iqbal*, the court could not establish that plaintiff's facts as pled plausibly entitled it to relief. Accordingly, the case was dismissed.

C. *Whether a Revocation of a Customs Classification Ruling Actually Occurred*

Importers and businesses need certainty in their import transactions as a dramatic difference in duty rates can negatively affect their interests and even result in bankruptcy. Accordingly, importers frequently seek administrative classification rulings from Customs. In *Canex International Lumber Sales Ltd. v. United States*,<sup>56</sup> the CIT decided a case involving the issue of whether CBP had revoked a ruling that it had issued classifying lumber.

Canex, a Canadian remanufacture/wholesale company for lumber products, entered lumber into the United States.<sup>57</sup> According to Canex, its customer would ship the lumber it imported to end user truss manufacturers in the United States.<sup>58</sup> After reviewing two prior classification rulings<sup>59</sup> issued by Customs to other importers, Canex entered the merchandise as truss components under Heading 4418, Harmo-

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54. See 19 C.F.R. § 159.12(a)(2); see also 19 U.S.C. § 1673b(d)(2).

55. *FAG Holdings*, 744 F. Supp. 2d at 1356; see also 19 U.S.C. § 1504(d).

56. 32 I.T.R.D. (BNA) 1705 (Ct. Int'l Trade 2010).

57. *Id.* at 1706.

58. *Id.*

59. Tariff Classification of Truss Components Consisting of Softwood Lumber Pieces, NY B88564 (U.S. Customs & Border Prot. Sept. 9, 1997) (private ruling letter) (describing lumber with "[m]ost pieces" cut at an angle other than 90 degrees on both ends and states that each shipment was accompanied by illustrative literature showing how the pieces were designed to fit together to make a roof truss); Tariff Classification of Truss Components from Canada, NY B81359 (U.S. Customs & Border Prot. Feb. 6, 1997) (private ruling letter) (describing lumber which was cut to specific sizes and angles that would "depend on the size of the roof truss," and also was accompanied by diagrams that showed where the pieces would fit in a completed roof truss).

nized Tariff Schedule of the United States (HTSUS).<sup>60</sup>

Thereafter, Customs sent Canex an administrative Notice of Action stating that the lumber was classifiable under Heading 4407, HTSUS,<sup>61</sup> and that Customs would assess liquidated damages if Canex did not submit within twenty days a permit for the merchandise.<sup>62</sup> Canex did not submit a permit within the allotted time.<sup>63</sup> Customs subsequently liquidated the merchandise under Heading 4407, HTSUS, and issued notices of liquidated damages.<sup>64</sup> Canex filed two protests in a timely manner, which Customs denied.<sup>65</sup> The importer then commenced suit before the CIT.<sup>66</sup>

Canex moved for summary judgment, arguing that Customs' treatment violated 19 U.S.C. § 1625(c).<sup>67</sup> Section 1625(c) requires that Customs give interested parties an opportunity to submit comments whenever Customs issues a proposed interpretive ruling or decision which would modify or revoke a prior interpretive ruling or decision which has been in effect for at least sixty days.<sup>68</sup> Customs is also required to provide notice and comment if a ruling would have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions.<sup>69</sup> However, the Customs regulations expressly provide that a ruling letter classification applies only to articles that are *identical* to those in the ruling letter.<sup>70</sup>

The Government filed a cross-motion for summary judgment on the grounds that the merchandise was properly classified under Heading 4407, HTSUS.<sup>71</sup> Canex subsequently filed a cross-cross-motion for summary judgment, alleging that the correct classification was under

60. Canex filed an end use statement with each entry summary certifying that the lumber was purchased for use as truss components and that the angle was used in finished trusses. Occasionally, truss diagrams accompanied the end use statements. However, the importer never confirmed that the lumber corresponded to the truss diagrams. *Canex*, 32 I.T.R.D. (BNA) at 1706.

61. Heading 4407, HTSUS covers articles of wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm. *Id.* at 1705.

62. *Id.* at 1706.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1707; see 19 U.S.C. § 1625(c) (2006).

69. *Canex*, 32 I.T.R.D. (BNA) at 1707; see 19 U.S.C. § 1625(c).

70. 19 C.F.R. § 177.9(b)(2) (2011) ("Each ruling letter . . . will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.").

71. *Canex*, 32 I.T.R.D. (BNA) at 1706-07.

Heading 4418, or 4421,<sup>72</sup> HTSUS.<sup>73</sup>

Canex claimed that Customs' issuance of the Notice of Action and liquidation of its entries modified or revoked two of Customs' prior ruling letters without proper notice and comment in violation of § 1625(c).<sup>74</sup> The CIT explained that this claim was without merit because the imported merchandise was not identical to the merchandise in the ruling letters, which clearly were destined for specific use as part of a roof truss system.<sup>75</sup> The court determined that the intended end use of Canex's lumber was uncertain.<sup>76</sup> Furthermore, Canex's lumber was cut to a specific angle only on one end, unlike the merchandise described in the two ruling letters.<sup>77</sup> Accordingly, because the merchandise described in the ruling letters was not identical to Canex's, notice and comment pursuant to 19 U.S.C. § 1625(c) was not required.<sup>78</sup> Thereafter, the court engaged in a classification analysis and the government's cross-motion for summary judgment on the classification issue was granted.<sup>79</sup>

#### IV. CLASSIFICATION CASES DECIDED IN 2009 UNDER THE CIT'S 28 U.S.C. § 1581(A) JURISDICTION

Some of the most commonly contested CBP decisions that fall under the CIT's § 1581(a) subject matter jurisdiction regarded the agency's classification of imported goods under HTSUS.<sup>80</sup> One of the most important rules of classification is that, absent contrary legislative intent, "HTSUS terms are to be construed in accordance with their common and commercial meaning."<sup>81</sup>

The CAFC reviews the CIT's determinations as to questions of law,

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72. *Id.* at 1707.

73. Heading 4418, HTSUS covers builders' joinery and carpentry of wood, including cellular wood panels, assembled parquet panels, shingles and shakes. *Id.* at 1706. Heading 4421, HTSUS covers other articles of wood. *Id.* at 1711.

74. *Id.* at 1707.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 1711.

80. Customs classification decisions are reviewed *de novo*. See 28 U.S.C. § 2640 (2006); see also *Kahrs Int'l., Inc. v. United States*, 645 F. Supp. 2d 1251, 1266 (Ct. Int'l Trade 2009) (explaining that where "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law," and the court reviews Customs' classification decisions *de novo*).

81. *CamelBak Prods., LLC v. United States*, 704 F. Supp. 2d 1335, 1340 (Ct. Int'l Trade 2010), *rev'd*, 649 F.3d 1361 (Fed. Cir. 2011).

including the interpretation of the terms of the HTSUS, de novo.<sup>82</sup> Factual findings of the CIT, including which heading of the HTSUS the merchandise falls within, are reviewed for clear error.<sup>83</sup> The CAFC will determine that a finding is clearly erroneous when, “although there is evidence to support it, the reviewing court is left with a ‘definite and firm conviction that a mistake has been committed.’”<sup>84</sup> While the majority of the CIT’s classification decisions are upheld, it is worth discussing some of the decisions made by the CIT in 2009 and 2010 that were reversed by the CAFC—and the basis for the CAFC’s reversal.

#### A. *The CIT’s Decision in Outer Circle Products v. United States*

One of the cases decided by the CIT in 2009, *Outer Circle Products v. United States*,<sup>85</sup> dealt with the proper classification of imported goods under Heading 4202, HTSUS. This provision covers a group of items that may be generally described as luggage and containers. The government frequently alleges that this heading is proper because of its high duty rate—19% *ad valorem*. Conversely, importers frequently challenge a classification under this heading for the same reason.

In *Outer Circle Products*, the importer challenged Customs’ classification of its imported bottle wraps.<sup>86</sup> Upon importation, CBP classified the wraps under Subheading 4202.92.90, HTSUS, at a duty rate of 19.3% *ad valorem*.<sup>87</sup> Outer Circle protested this classification and as-

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

83. *Id.*

84. Timber Prods. Co. v. United States, 515 F.3d 1213, 1220 (Fed. Cir. 2008) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

85. 602 F. Supp. 2d 1294 (Ct. Int’l Trade 2009), *rev’d*, 590 F.3d 1323 (Fed. Cir. 2010).

86. *Id.* at 1299.

87. At issue in this case were HTSUS headings 4202 and 3924:

4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:

Other:

4202.92 With outer surface of sheeting of plastic or of textile materials:

4202.92.90 Other 19.3%

3924 Tableware, kitchenware, other household articles and toilet articles, of plastics:

serted that Customs should have classified the wraps under Subheading 3924.10.50, HTSUS, which has a duty rate of 3.4% *ad valorem*.<sup>88</sup> Customs denied the protest, and Outer Circle filed a summons with the CIT.<sup>89</sup> The imported goods were soft-sided, flexible wraps that were constructed out of a polyvinyl chloride (PVC) closed-cell thermal-insulating foam layer.<sup>90</sup> The interior surface of the foam wraps was covered with either a fabric or vinyl sheet, and the exterior surface was covered with a vinyl sheet. The wraps were cut and sewn into the shape of three sizes of plastic containers: (1) a 1-liter bottle; (2) a 0.5-gallon jug; and (3) a 2-gallon jug.<sup>91</sup> A zipper on the wraps enabled a bottle or jug to be inserted and removed from them.<sup>92</sup> The court explained that it was only after importation, but prior to resale, that the plaintiff inserted a plastic bottle or jug into each wrap.<sup>93</sup>

The CIT held that the wraps fell under the exemplar term “bottle cases” heading 4202, HTSUS<sup>94</sup> because the court believed that the focus in determining the proper classification “must be on ‘whether food or beverage is involved’” when the merchandise was actually imported.<sup>95</sup>

#### B. *The CAFC’s Reversal in Outer Circle Products v. United States*

Following the decision in favor of the government, *Outer Circle* appealed the CIT’s grant of summary judgment, which found that the bottle and jug wraps were classified under Subheading 4202.92.90, HTSUS,<sup>96</sup> and the CAFC reversed the CIT’s decision.<sup>97</sup> The CAFC explained that the CIT had misconstrued *SGL, Inc. v. United States*,<sup>98</sup>

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3924.10 Tableware and kitchenware:  
3924.10.50 Other 3.4%

U.S. INT’L TRADE COMM’N, PUB. NO. 3001, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, headings 4202, 3924 (1996).

88. *Outer Circle*, 602 F. Supp. 2d at 1299.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 1309.

95. *Id.* at 1304 (citing *SGL v. United States*, 122 F.3d 1468, 1472 (Fed. Cir. 1997)).

96. *Id.* at 1309.

97. *Outer Circle Prods. v. United States*, 590 F.3d 1323, 1324 (Fed. Cir. 2010).

98. 122 F.3d 1468 (Fed. Cir. 1997).

which addressed the proper scope of Heading 4202.<sup>99</sup> Specifically, the CAFC indicated that what it had determined in *SGI* was that Heading 4202 did “not include containers that organize, store, protect, or carry food or beverages.”<sup>100</sup> The containers in *SGI* were similar to the wraps at issue, not designed to hold uncontained food or beverages. The CIT had distinguished *SGI* on the ground that the term “bottle cases” was an *eo nomine* (i.e., by name) provision under HTSUS Heading 4202. The CAFC disagreed and explained that *SGI* explicitly analyzed the *eo nomine* exemplars and found that “none of the exemplars under Subheading 4202.92.90 involves *containment* of any food or beverage.”<sup>101</sup> Accordingly, the CAFC determined that *SGI* was controlling.<sup>102</sup>

What is significant is the CAFC’s discussion that the classification “focus must be on ‘whether food or beverage is involved.’”<sup>103</sup> The CIT had sought to make a commercial distinction—that the coolers in *SGI* were capable of storing food and/or beverage without further additions, whereas Outer Circle’s products required the insertion of a bottle or jug.<sup>104</sup> The CAFC concluded that by making this distinction, and finding that the subject articles were not containers that organize, store, protect, or carry food or beverages the lower court had erred.<sup>105</sup>

The CAFC reasoned that this sort of commercial distinction in the context of a classification decision strained logic (and was unsupported by record evidence).<sup>106</sup> Specifically, the CAFC criticized the lower court’s determination that the utility of the bottle wraps “as insulated beverage containers arises only after the containers are mated to the requisite bottle or jug.”<sup>107</sup> From a commercial standpoint, the imported insulated wraps’ only purpose was to have a bottle placed into them. Accordingly, the CAFC determined that because the subject articles “organize, store, protect, or carry food or beverages,” they could not be classified under Heading 4202, HTSUS,<sup>108</sup> and similar to the coolers in *SGI*, the proper classification was Heading 3924, HTSUS,

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99. *Outer Circle*, 590 F.3d at 1326.

100. *Id.* (citing *SGI*, 122 F.3d at 1472).

101. *Id.* at 1326 (citing *SGI*, 122 F.3d at 1472 (emphasis added)).

102. *Id.* at 1326.

103. *Outer Circle Prods. v. United States*, 602 F. Supp. 2d 1294, 1304 (Ct. Int’l Trade 2009), *rev’d*, 590 F.3d 1323 (Fed. Cir. 2010) (citing *SGI*, 122 F.3d at 1472).

104. *Outer Circle*, 590 F.3d at 1326.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

which provided for “household articles” of plastics.<sup>109</sup>

C. *The CIT’s Decision in storeWALL LLC v. United States*

In the same fashion that luggage tariff provision determinations made by CBP are frequently challenged, so too are the tariff provisions for furniture and parts of furniture. This is again because of the large duty differential. In *storeWALL v. United States*,<sup>110</sup> the merchandise at issue was wall panels and locator tabs used in conjunction with home organization and storage systems. The tabs were made of plastic and were specially designed mounting hooks for the wall panels.<sup>111</sup> In order to create the system, the purchaser attaches the locator tabs to the wall, and the wall panels rest upon the locator tabs.<sup>112</sup> The wall panels were also constructed from rigid plastic and contained an “L” shaped groove in which the end user could place shelves, cupboards, baskets, hooks and other attachments to create a customized storage or display unit.<sup>113</sup> However, the wall panels and the tabs were imported separately from the other components.<sup>114</sup>

Customs classified the wall panels under Heading 3916, HTSUS, a tariff provision which covered plastics<sup>115</sup> and the tabs under Heading 3926, HTSUS, a different tariff plastics provision.<sup>116</sup> *storeWALL* filed three protests and requested that Customs reclassify both the wall panels and the tabs under Heading 9403, HTSUS, a tariff provision for plastic parts of furniture.<sup>117</sup> Customs denied all three of *storeWALL*’s protests.<sup>118</sup> *storeWALL* commenced the case before the CIT and the court decided the issue on cross motions for summary judgment.<sup>119</sup>

The CIT began by analyzing whether the wall panels and tabs were

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109. *Id.*

110. 675 F. Supp. 2d 1200 (Ct. Int’l Trade 2009), *rev’d*, 644 F.3d 1358 (Fed. Cir. 2011).

111. *See id.* at 1202.

112. *See id.* (subheading 3926.90.98, HTSUS, covers “Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other.”).

113. *Id.*

114. *See id.* (subheading 9403.70.80, HTSUS provides for “Other furniture and parts thereof: Furniture of plastics: Other,” and the locator tabs under Subheading 9403.90.50, a provision for “Other furniture and parts thereof: Parts: Others: Of rubber or plastics: Other.”).

115. *See id.* (Subheading 3916.20.00, HTSUS covers “Monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks and profile shapes, whether or not surfaced-worked but not otherwise worked, of plastics: Of polymers of vinyl chloride.”).

116. *Id.*

117. *Id.* at 1201.

118. *Id.*

119. *Id.*

properly classifiable as “[o]ther furniture and parts thereof” under Heading 9403.<sup>120</sup> The CIT explained that although the HTSUS does not explicitly define the term “furniture,” the Chapter Notes<sup>121</sup> clarify that items which are designed “to be hung, to be fixed to the wall or to stand one on the other” such as “cupboards, bookcases, other shelved furniture, and unit furniture” are classifiable under Heading 9403.<sup>122</sup> The CIT also noted that the Explanatory Notes attempt to clarify what is included within the scope of unit furniture:

The Explanatory Notes do not define “unit furniture” either, but add a caveat that “unit furniture” must be “designed to be hung, to be fixed to the wall or to stand one on the other or side by side, for holding various objects or articles (books, crockery, kitchen utensils, glassware, linen, medicaments, toilet articles, radio or television receivers, ornaments, etc.).” The Explanatory Notes also include within the definition of furniture “separately presented elements of unit furniture,” but expressly exclude from coverage under Heading 9403 “other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers and newspaper racks. . . .”<sup>123</sup>

The HTSUS does not define the term “unit furniture” or provide any guidance regarding the scope or meaning of the term. Accordingly, the CIT also reviewed dictionary definitions of the term “unit” and ultimately defined “unit furniture” as:

[A]n item

- (a) fitted with other pieces to form a larger system or which is itself composed of smaller complementary items,
- (b) designed to be hung, to be fixed to the wall, or to stand one on the other or side by side, and
- (c) assembled together in various ways to suit the consumer’s individual needs to hold various objects or articles, but

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120. *Id.* at 1203.

121. *See id.* at 1203-04 (The HTSUS is used and interpreted by reference to the General Rules of Interpretation (“GRI”), and the Additional U.S. Rules of Interpretation. These two rules set down the basic procedure for classifying product. In addition, each Section and Chapter of the HTSUS contains Notes regarding interpreting that Section or Chapter).

122. *Id.* at 1203-04 (citing U.S. INT’L TRADE COMM’N, PUB. NO. 3565, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, chapter 94, n.2 (2003)).

123. *Id.* at 1204.

- (d) excludes other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks.<sup>124</sup>

After resorting to additional sources, the CIT determined that under the definition of “unit furniture,” a *completed* storeWALL system could be classifiable as unit furniture.<sup>125</sup> However, the court also explained that if an end user decided to accessorize the wall panels “only with hooks, as opposed to shelves or baskets,” then the system is “merely a rack, which is expressly excluded from coverage.”<sup>126</sup> Therefore, the CIT concluded that because a completed storeWALL system was not always “unit furniture,” the wall panels and tabs were not facially classifiable under Heading 9403 because the units were capable for use as racks.<sup>127</sup> The court also reached this decision because it determined that the imported parts must be dedicated solely or principally for use with the classified item.<sup>128</sup> Accordingly, the CIT classified both the panel and the tabs under the plastics provision in Heading 3926, HTSUS.<sup>129</sup>

D. *The CAFC’s Reversal in storeWALL LLC v. United States*

On appeal, storeWALL argued that the CIT erred by defining “unit furniture” to exclude “other wall fixtures such as coat, hat and similar racks, key racks, clothes brush hangers, and newspaper racks.”<sup>130</sup> The CAFC discussed “storeWALL’s proposed definition” of “unit furniture” as:

[A]n article or articles of convenience or decoration, used to furnish living quarters or other spaces, composed of more or less repetitive sections which are combined to form either a single article or a larger system of articles (Chapter 94 Note 2 makes clear that such “unit furniture” includes articles designed for placing on the floor or ground, to be hung, to be fixed to the wall, or to stand one on the other).<sup>131</sup>

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124. *Id.*

125. *Id.* at 1204.

126. *Id.* at 1205.

127. *Id.* at 1205-06.

128. *See id.* at 1205.

129. *Id.* at 1206.

130. storeWALL, LLC v. United States, 644 F.3d 1358, 1362 (Fed. Cir. 2011).

131. *Id.* at 1362.

On appeal, storeWALL argued that the “rack exclusion” that the CIT had crafted based on the Explanatory Notes was improper because it was “inconsistent with the broad common and commercial meaning of the term ‘unit furniture.’”<sup>132</sup> Therefore, storeWALL argued before the CAFC that the Explanatory Notes “cannot be used to contradict or artificially limit the broad common and commercial meaning of [‘unit furniture’].”<sup>133</sup> In response, the government argued that the CIT properly relied on the Explanatory Notes to define “unit furniture.”

The CAFC reiterated that in instances such as this, where the HTSUS does not specifically define a term, the correct meaning of the term is its “common commercial meaning” absent contrary evidence.<sup>134</sup> The court went on to explain that in order to determine the “common commercial meaning” of a tariff term, the courts could consult dictionaries, encyclopedias, scientific authorities, and other reliable information sources.<sup>135</sup>

The CIT had determined that the panels and tabs were not parts of “unit furniture” because a completed storeWALL system was “too fungible at the time of importation to possess one fixed and certain application as unit furniture.”<sup>136</sup> storeWALL contended that the CIT’s classification error occurred when it determined that the completed system accessorized only with hooks was “merely a rack,” and was therefore, excluded from Heading 9403.<sup>137</sup>

The CAFC determined that a storeWALL system is “fungible” because of the system’s versatility, which is the commercial hallmark of unit furniture.<sup>138</sup> The court went on to explain the commercial aspects of the system that drove the classification decision such as “[t]he versatility and adaptability of a completed storeWALL system is the reason that such a system, equipped only with hooks, is dissimilar to wall fixtures such as coat, hat and similar racks.”<sup>139</sup> For example, an end user may add shelving, cupboards, baskets, etc. to a storeWALL system initially equipped only with just hooks.<sup>140</sup> Indeed, the end user could

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132. *Id.*

133. *Id.* (emphasis added); *see also* Archer Daniels Midland Co. v. United States, 561 F.3d 1308 (Fed. Cir. 2009); Airflow Tech., Inc. v. United States, 524 F.3d 1287 (Fed. Cir. 2008).

134. *storeWALL*, 644 F.3d at 1363; *see also* Airflow Tech., 524 F.3d at 1291.

135. *storeWALL*, 644 F.3d at 1363; Warner-Lambert Co. v. United States, 407 F.3d 1207, 1209 (Fed. Cir. 2005).

136. *storeWALL*, 644 F.3d at 1364.

137. *Id.* at 1363.

138. *Id.* at 1364.

139. *Id.*

140. *Id.*

remove all of the hooks and replace them with other accessories.<sup>141</sup>

The court explained that the commercial reality of the system was dissimilar from a coat or hat rack, or any conceivable “similar rack,” because those items did not possess the same flexibility.<sup>142</sup> The court stated that commercially, “one day a storeWALL system could only have hooks, and the next it could only contain shelving - but that a coat rack will always be just a coat rack.”<sup>143</sup> Therefore, in contrast to the view of the CIT, the fact that the end user has the option to add or subtract accessories to the system was the very reason that the CAFC determined that the system was unit furniture.<sup>144</sup> Moreover, because the wall panels and tabs that were at issue were dedicated solely for use with the system, and commercially, as explained above, the system was unit furniture, the CIT “clearly erred by not classifying the products as ‘parts’ of unit furniture under Subheading 9403.90.50, HTSUS.”<sup>145</sup>

V. CLASSIFICATION CASES DECIDED IN 2010 UNDER THE CIT’S 28 U.S.C.  
§ 1581(A) JURISDICTION

A. *The CIT’s Decision in CamelBak Products, LLC v. United States*

*CamelBak Products, LLC v. United States*<sup>146</sup> concerned the proper classification of back-mounted packs that contained an insulated liquid bladder compartment. Plaintiff imported packs which were designed to be worn during recreational activities such as “hiking, biking, snowboarding, or rock climbing so that the user could drink from the bladder or reservoir in a hands-free fashion.”<sup>147</sup> On June 26, 2000, plaintiff sought an administrative classification ruling on eleven of its packs. Customs issued the ruling and classified the packs in a Heading 4202, HTSUS, provision for luggage with a high duty rate.<sup>148</sup>

Thereafter, between August 6, 2004 and August 27, 2004, the plaintiff began importing the subject merchandise that Customs classified according to its ruling<sup>149</sup> with a rate of duty of 17.8% *ad valorem*.<sup>150</sup>

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (explaining that even if the system was equipped only with hooks, its versatility and adaptability required its classification as unit furniture).

145. *Id.*

146. 704 F. Supp. 2d 1335 (Ct. Int’l Trade 2010), *rev’d*, 649 F.3d 1361 (Fed. Cir. 2011).

147. *Id.* at 1337.

148. *Id.* at 1340.

149. *See id.* at 1336.

150. *Id.*

CamelBak filed a protest challenging Customs' classification, and when Customs denied the protest, CamelBak commenced this action pursuant to the CIT's jurisdiction under 28 U.S.C. § 1581(a).<sup>151</sup>

The parties filed cross-motions for summary judgment, as it was uncontested that the packs were primarily used commercially for outdoor activities and athletics (i.e., cycling, running, hiking and skiing) and there was no question as to the composition of the packs. The court explained that the packs were designed to deliver water to the user in a "hands-free" fashion, allowing the user to consume water on-the-go without interrupting the activity in which he or she was engaged.<sup>152</sup> Each of the packs was a textile bag with shoulder straps that featured:

- (a) a polyurethane reservoir or bladder surrounded by a closed-cell polyethylene foam compartment designed to carry and maintain the temperature of water or another beverage;<sup>153</sup>
- (b) a hydration delivery system composed of flexible tubing attached to the reservoir, a bite valve and a shut-off valve; and
- (c) a cargo compartment designed to hold food, clothing, gear and supplies.<sup>154</sup>

Plaintiff argued that the packs were "composite goods" made up of two components—the cargo component, which was facially "classifiable as a 'travel, sports or similar bag'" and the hydration component, which was classifiable as an "insulated beverage bag."<sup>155</sup> Plaintiff also contended that the merchandise had to be classified pursuant to General Rule of Interpretation (GRI) 3(b)'s essential character test because the two applicable subheadings only referred to part of the pack.<sup>156</sup> Applying the essential character test, plaintiff argued that the hydration component (i.e., the insulated beverage bag component) gave the subject articles their essential character and that the merchandise was properly classified as either "insulated food and beverage bags" whose interior incorporates only a flexible plastic container of a kind for storing and dispensing potable beverages through attached flexible tubing under Subheading 4202.92.04 or, alternatively, "insulated food

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151. *Id.* at 1336-37.

152. *Id.* at 1337.

153. Each water reservoir had a capacity of between thirty-five and one hundred ounces of liquid. *Id.*

154. Each cargo compartment could accommodate between 300 and 1680 cubic inches, depending on the style of pack. *Id.*

155. *Id.* at 1345.

156. *Id.*

and beverage bags . . . other” under Subheading 4202.92.08, both subject to duties at a rate of 7% *ad valorem*.<sup>157</sup> This was obviously significantly lower than the tariff provision claimed by the government.

In response, the government claimed that the packs were not composite goods, but rather that a single tariff provision—the “travel, sports, and similar bags” provision of the HTSUS—applied to the articles in their entirety under Subheading 4202.92.30, HTSUS, through a straightforward application of GRI 1.<sup>158</sup> The CIT began its analysis by applying GRI 1 to determine whether the subject articles were classifiable as a whole under a particular heading and subheadings.<sup>159</sup> The court reached the conclusion that the subject articles were backpacks.<sup>160</sup> In reaching this decision, the CIT defined the following terms in its opinion:

- (1) a “traveling bag” includes “all forms of flexible containers used by travelers to carry or store items”;<sup>161</sup>
- (2) a “sports bag” includes “all forms of flexible containers used by individuals to carry or store items while they are engaged in activities involving physical exertion, or active pastime or recreation”;<sup>162</sup>
- (3) an “insulated beverage bag” includes “all forms of flexible reusable containers that are used to maintain the temperature of potable liquids during their transport or temporary storage”;<sup>163</sup> and
- (4) a “backpack” includes all forms of “bags made of sturdy material, which feature padded, adjustable shoulder straps, and which are designed to permit supplies and gear to be carried on the wearer’s back.”<sup>164</sup>

The court also noted that there were four competing subheadings: (1) insulated food or beverage bags; (2) travel, sports, and similar bags; (3) musical instrument cases; and (4) other.<sup>165</sup> The CIT then looked to

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157. *Id.* at 1336, 1339.

158. *Id.* at 1338.

159. *Id.* at 1340.

160. *Id.* at 1339, 1342.

161. *Id.* at 1342.

162. *Id.* at 1341.

163. *Id.*

164. *Id.*

165. *Id.* at 1342.

Additional U.S. Note 1 to HTSUS Chapter 42.<sup>166</sup>

The court found that a portion of each of the subject articles was designed to carry liquids, while the remainder of the capacity was designed to carry cargo.<sup>167</sup> Nevertheless, the court determined that the articles “fall[] within the tariff provision covering ‘travel, sports, and similar bags,’ and [are] prima facie classifiable there-under[,]” because they are properly described as “backpacks.”<sup>168</sup> The court decided that the packs could not be described as beverage bags as a whole because there was too much cargo space (rather than beverage space).<sup>169</sup> In reaching this decision, the court rejected the plaintiff’s argument that the hydration component removed the packs from the scope of the backpack provision, which made them new articles of commerce and composite goods.<sup>170</sup> The court explained that “[t]he mere fact that a piece of merchandise may consist of more than one component does not necessarily make that merchandise a ‘composite good’ . . .”<sup>171</sup> The CIT then determined that “[t]here is nothing about incorporating into a backpack a compartment designed to contain (and maintain the temperature of) beverages that makes the backpack *not* a backpack.”<sup>172</sup> Thus, the court regarded the hydration component as incidental and did not consider its design or use as contributing to the classification characteristics of the articles.<sup>173</sup>

Ultimately, the CIT believed that “the water-carrying and dispensing functionalities” of the packs “do not remove them from the purview of ‘travel, sports and similar bags’” because the tariff provision covering “travel, sports, and similar bags” was an *eo nomine* (by name) provision, which included all forms of the named article, even improved forms.<sup>174</sup>

#### B. *The CAFC’s Reversal of CamelBak Products LLC v. United States*

CamelBak appealed the CIT’s holding that the merchandise at issue was properly classified as “travel, sports, and similar bags” under

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166. This note explains that the subheading “travel, sports and similar bags” is broad and refers to “goods . . . of a kind designed for carrying clothing and other personal effects during travel, including *backpacks* and shopping bags of this heading . . .” *Id.*

167. *Id.* at 1344.

168. *Id.* at 1342.

169. *Id.* at 1344.

170. *See id.*

171. *Id.* at 1345.

172. *Id.* at 1346.

173. *See id.*

174. *Id.* at 1343.

Subheading 4202.92.30 of the HTSUS to the CAFC.<sup>175</sup> The CAFC reversed and remanded the case.<sup>176</sup>

In order to determine whether the subject article is classifiable in and within an *eo nomine* provision, the courts look at whether the merchandise is merely an improvement over previous articles or whether it has had a change in identity to something other than the article described by the HTSUS.<sup>177</sup> The CAFC had previously held in *Casio, Inc. v. United States*<sup>178</sup> that when an article “is in character or function something other than as described by a specific statutory provision—either more limited or more diversified—and the difference is significant,” it is not properly classified in an *eo nomine* provision.<sup>179</sup> The criterion used by the court in making this determination is whether the item “possess[es] features substantially in excess of those within the common meaning of the term.”<sup>180</sup>

The classification rules provide that when goods are facially classifiable under two or more headings (or subheadings) in the HTSUS, the classification is properly resolved by application of GRI 3.<sup>181</sup> When two subheadings of the HTSUS refer to only part of the materials in composite goods, they are “regarded as equally specific” under GRI 3(a), and GRI 3(b) is applied to resolve the classification.<sup>182</sup> GRI 3(b) instructs that classification be accomplished by determining which of the different components “gives them their essential character.”<sup>183</sup>

The CIT’s decision had defined various terms and concluded that the subject articles were properly classifiable under Heading 4202,

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175. *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, at 1362 (Fed. Cir. 2011); *see also* U.S. INT’L TRADE COMM’N, PUB. NO. 3653, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2004).

176. *CamelBak*, 649 F.3d, at 1370-71.

177. *See* *United Carr Fastener Corp. v. United States*, 54 C.C.P.A. 89, 91 (1967).

178. 73 F.3d 1095 (Fed. Cir. 1996).

179. *Id.* at 1097 (quoting *Robert Bosch Corp. v. United States*, 63 Cust. Ct. 96, 103-04 (1969)).

180. *Casio, Inc. v. United States*, 73 F.3d 1097, 1098 (Fed. Cir. 1996) (internal quotations and citations omitted).

181. *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1336 (Fed. Cir. 2007). GRI 3(a) is applied when the goods are in fact facially classifiable under two or more headings or subheadings in order to determine which heading provides the most specific description of the merchandise at issue. *See* *Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1251-52 (Fed. Cir. 2004).

182. *CamelBak Prods., LLC v. United States*, 649 F.3d at 1365 (Fed. Cir. 2011); *see also* *Bauer Nike Hockey*, 393 F.3d at 1252.

183. *CamelBak*, 649 F.3d, at 1365.

HTSUS.<sup>184</sup> On appeal, CamelBak reargued that the subject articles were made up of two major components, each of which is prima facie classifiable under a different subheading, i.e., the cargo component, which is prima facie classifiable under 4202.92.30 HTSUS and the hydration component, which is prima facie classifiable under 4202.92.04 HTSUS.<sup>185</sup> CamelBak argued that the CIT erred when it failed to conduct a GRI 3(b) essential character analysis.<sup>186</sup>

Interestingly, the CAFC used case law from its predecessor court, the Court of Customs and Patent Appeals, in reaching its decision. The CAFC found that the design of the subject articles was important when reviewing the classification.<sup>187</sup> Additionally, several commercial factors advanced the court's assessment of how the subject articles were regarded in commerce,<sup>188</sup> how the subject articles are described in sales and marketing literature,<sup>189</sup> and whether the additional component is a substantial or incidental part of the whole product.<sup>190</sup>

The CAFC determined that the CIT clearly erred in finding that the subject articles were nothing more than improved backpacks.<sup>191</sup> It found that the subject articles “possess[ ] features *substantially in excess* of those within the common meaning of the term backpack as defined by the CIT.”<sup>192</sup> Moreover, there was a substantial difference in identity

184. CamelBak Prods., LLC v. United States, 704 F. Supp. 2d 1335, 1340, 1342 (Ct. Int'l Trade 2010), *rev'd*, 649 F.3d 1361 (Fed. Cir. 2011).

185. *CamelBak*, 649 F.3d, at 1366-67.

186. *Id.* at 1367.

187. *Trans-Atlantic Co. v. United States*, 471 F.2d 1397, 1399 (C.C.P.A. 1973) (“[W]e think that the primary function of the imported article should govern classification.”); *United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73 (1959) (“use cannot be ignored in determining whether an article falls within an *eo nomine* tariff provision.”); *see also* *BASF Wyandotte Corp. v. United States*, 855 F.2d 852, 853 (Fed. Cir. 1988) (citing *Quon Quon* for the proposition that “the use of a product may be considered in determining the classification of that article.”).

188. *See Servo-Tek Prods. Co. v. United States*, 416 F.2d 1398, 1400 (C.C.P.A. 1969) (concluding that the subject articles were not regarded in commerce as merely “motors” and should not be classified as such).

189. *See Fairchild Camera & Instrument Corp. v. United States*, 53 C.C.P.A. 122, 124 (1966) (classifying the subject articles as “cameras” based, in part, on the fact that they were consistently described as “cameras” in sales literature).

190. *Cf. United States v. N.Y. Merch. Co.*, 435 F.2d 1315, 1317 (C.C.P.A. 1970).

191. Wesley Watson, CamelBak's Vice President of Global Sourcing and Distribution testified CamelBak's “core product is manufactured around hydration; allowing hydration to be provided to an active user in the best way and the easiest way.” *CamelBak*, 649 F.3d, at 1368. The articles in question do exist to allow for hands-free drinking capabilities during certain activities. *Id.* Thus, the CIT erred when it simply characterized the hands-free hydration component as “a mere feature without considering the subject articles' primary design and use.” *Id.*

192. *Id.* (citing *Casio, Inc. v. United States*, 73 F.3d 1097, 1098 (Fed. Cir. 1996)).

of the subject articles from a conventional backpack as demonstrated by commercial factors.<sup>193</sup> These factors included:

- (1) higher prices as compared to conventional backpacks;<sup>194</sup>
- (2) the placement of the subject articles in retail catalogues and stores in a “hydration pack” section rather than a “backpack” section; and
- (3) CamelBak’s reference to the subject articles as “hydration packs” in its literature and marketing materials.

“The CAFC found that these factors demonstrated that subject articles are commercially known, advertised and sold as ‘hydration packs,’ as opposed to backpacks, and that consumers purchase them for different reasons than they purchase conventional backpacks.”<sup>195</sup> Thus, the packs could not be classified as conventional backpacks.

In contrast to the CIT’s conclusion that the subject articles were simply improvements over the conventional backpack, the CAFC found that the hydration component was not merely incidental to the cargo component but, instead, provides the articles with a unique identity and use that removes them from the scope of the *eo nomine* backpack provision.<sup>196</sup> Rather, the packs were made up of two components (i.e., composite goods), which lacked a single specific classification (there was no HTSUS provision for combination backpacks and hydration packs).<sup>197</sup>

Each component of the subject articles is classifiable under a separate subheading of 4202.92 HTSUS—the cargo component is classifiable as a “travel, sports, or similar bag” under 4202.92.30, HTSUS, and the hydration component is classifiable as an “insulated food and beverage bag” under 4202.92.04 (or 4202.92.08) HTSUS, and accordingly, GRI 3(b) controlled the classification.<sup>198</sup>

Finally, CamelBak contended that there were no factual disputes to resolve with respect to the essential character of the subject articles because the parties agreed on the basic nature of the products and the government failed to refute the evidence CamelBak adduced in support of its summary judgment motion.<sup>199</sup> The court disagreed because the essential character of the subject merchandise was a question of fact

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193. *Id.* 1369.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

to be determined by the court.<sup>200</sup> Therefore, because the parties disputed the essential character of the subject articles, the CAFC remanded the case to the CIT to resolve the issue.<sup>201</sup>

C. *The CIT's Decision in BenQ Am. Corp. v. United States*

The plaintiff challenged CBP's decision denying the importer's classification protest of certain liquid crystal display (LCD) flat panel color monitors, which were manufactured for Dell by the plaintiff and imported from the People's Republic of China in 2004.<sup>202</sup> The plaintiff argued that the monitors should have been classified as display units for automatic data processing (ADP) machines under Heading 8471, HTSUS, and thus, duty-free.<sup>203</sup> The Government maintained that Customs properly classified the merchandise as "video monitors" under Heading 8528, HTSUS, which was subject to a duty of 5% *ad valorem*.<sup>204</sup> While the parties disagreed as to the meaning and scope of the tariff provisions at issue, they were in agreement as to the nature of the imported merchandise and the case was decided on motions for summary judgment.<sup>205</sup>

The monitors at issue were imported with four inputs:

- (1) an analog RGB connector (also called the "D-sub 15" connector);
- (2) a digital video interface (DVI-D) connector;
- (3) a separate video (S-video) connector; and
- (4) a composite video connector.<sup>206</sup>

"The analog RGB and DVI-D inputs are connections for a personal computer."<sup>207</sup> "The S-video and composite video inputs are connections for use with video devices including DVD players," VCRs, and

200. See *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1337 (Fed. Cir. 2007) ("the application of this [essential character] test requires a fact-intensive analysis"); *Pillsbury Co. v. United States*, 431 F.3d 1377, 1380 (Fed. Cir. 2005) ("Predominance [in the context of GRI 3(b)] is a factual determination . . .").

201. *CamelBak*, 649 F.3d, 1369-70.

202. *BenQ Am. Corp. v. United States*, 683 F. Supp. 2d 1335 (Ct. Int'l Trade 2010), *rev'd*, 646 F.3d 1371 (Fed. Cir. 2011).

203. *Id.* at 1337.

204. Customs did not issue a ruling to Plaintiff in this case. *Id.* at 1339. As of 2007, heading 8528, HTSUS, was amended. See U.S. INT'L TRADE COMM'N, PUB. NO. 4201, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, heading 8528 (2010).

205. *BenQ*, 683 F. Supp. 2d at 1339.

206. *Id.* at 1338.

207. *Id.* at 1338.

game consoles.<sup>208</sup> “The monitors also included a 4-port USB 2.0 hub, to allow for the connection of digital cameras, and other devices.”<sup>209</sup> The government argued the monitors could also be attached to a television cable box.<sup>210</sup>

The importer and the government both agreed that “the monitors were ‘multi-media monitors,’ that were ‘designed to function as’ and have ‘the physical characteristics of both an ADP system monitor and a video monitor.’”<sup>211</sup> Thus, the court determined that “as designed, manufactured, and imported, the monitors” were equipped to receive signals from both computers and other non-computer devices.<sup>212</sup>

The plaintiff claimed that the monitors at issue should properly be classified under Subheading 8471.60.45, HTSUS.<sup>213</sup> Customs classified the monitors under Subheading 8528.21.70, HTSUS.<sup>214</sup>

In furtherance of its argument, the plaintiff had commissioned a study, which surveyed the purchasers of the monitor (and a somewhat earlier model).<sup>215</sup> The results of the study indicated that “[a] very large majority (86.6 percent) of survey respondents . . . purchas[ed] the monitors . . . for use principally as a display unit for computer uses,” and “[a]n overwhelming majority (more than 99 percent of survey respondents)” were using the monitors with a computer.<sup>216</sup> The government argued that the study was invalid in general. This argument concerning the device’s use would become relevant during the appeal.<sup>217</sup>

In support of its argument, the plaintiff relied on Section XVI Note 3 of the HTSUS and claimed that “the fundamental issue in this case” was “the principal function of the imported merchandise, that of a computer monitor or of a video monitor.”<sup>218</sup> The CIT, however, determined that under Chapter 84 Note 5 (read in tandem with the relevant Explanatory Notes), the pivotal issue was instead whether the imported merchandise can “perform[] a specific function other than

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208. *Id.*

209. *Id.* at 1338 n.6.

210. *Id.*

211. *Id.* at 1338.

212. *Id.*

213. *Id.* at 1338 n.7.

214. *Id.* at 1339 n.8.

215. *Id.* at 1337.

216. *Id.*

217. *Id.* at 1338 n.5. The CIT indicated that there was no need to consider either the survey or the government’s objections in order for the court to reach its decision.

218. *Id.* at 1340 (citing Plaintiff’s Reply Brief at 10, *BenQ Am. Corp. v. United States*, 683 F. Supp. 2d 1335 (Ct. Int’l Trade 2010) (No. 05-00637)).

data processing” or, stated differently, whether the monitors “are capable of accepting a signal only from the central processing unit [CPU]” of a computer (or whether they can also accept non-computer signals).<sup>219</sup>

Ultimately, the CIT determined that the imported monitors were classified under Heading 8528, HTSUS, under a “straightforward” GRI I analysis.<sup>220</sup> The CIT explained that because the monitors could perform a specific function, other than operating in conjunction with a computer (e.g., displaying video from a DVD or other data source), they were to be classified according to that function. Accordingly, it held that the monitors were properly classified by CBP under Subheading 8528.21.70, HTSUS.<sup>221</sup>

#### D. *The CAFC’s Reversal in BenQ Am. Corp. v. United States*

The CAFC vacated and remanded the CIT’s decision regarding the tariff classification of BenQ’s video monitors.<sup>222</sup> The CIT based its classification decision on Note 5(E) to Chapter 84, which provides that “machine[s] incorporating or working in conjunction with an automatic data processing machine and performing a specific function other than data processing are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.”<sup>223</sup>

The CAFC determined that while the CIT focused on Chapter 84 Note 5(E), it did so erroneously and to the exclusion of Note 5(B).<sup>224</sup> Note 5(B) provided that:

Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:

- (a) It is of a kind solely or principally used in an automatic data processing system;
- (b) It is connectable to the central processing unit either directly or through one or more other units; and

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219. *Id.* at 1340; *see also* U.S. INT’L TRADE COMM’N, PUB. NO. 3653, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, chapter 84, n.5(E) (2004).

220. *BenQ*, 683 F. Supp. 2d at 1340.

221. *Id.* at 1345-46.

222. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1373 (Fed. Cir. 2011).

223. *Id.* at 1379.

224. *Id.*

- (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.<sup>225</sup>

The CAFC opinion indicated that the video monitors can only be classified as automatic data processing machine units if they satisfy the three conditions set out in Note 5(B).<sup>226</sup> The CAFC had determined that there was no question as to whether the products were “connectable to the central processing unit” or “able to accept or deliver data in a form (codes or signals) which can be used by the system.”<sup>227</sup> The CAFC held that the CIT did not conduct a proper principal use analysis as required by Note 5(B).<sup>228</sup> The CAFC also ruled that the Notes to the Chapter had to be read in order and that Note 5(E) could not be given priority over 5(B) in making a classification decision.<sup>229</sup> Accordingly, the case was remanded to the CIT for the court to resolve the issue of whether the monitors were of a kind “solely or principally used” in ADP machines.<sup>230</sup>

#### VI. WHAT THE CAFC REVERSALS OF CLASSIFICATION CASES DECIDED UNDER THE CIT’S 28 U.S.C. § 1581 (A) JURISDICTION HAVE IN COMMON

These cases illustrate that the appellate court felt that it was important for the CIT to engage in a proper analysis of the actual commercial use of the products at issue. What these reversals have in common, is the CAFC’s acknowledgment of the reality of the commercial environment in which the imported products are used and sold.

For example, in the *Outer Circle* case, the CIT held that the wraps were “bottle cases” because the court believed that the focus in determining the proper classification “must be on ‘whether food or beverage is involved’” when the merchandise was actually imported.<sup>231</sup> When the CAFC reversed, it determined that from a commercial standpoint, the imported insulated wrap’s *only purpose* was to have a bottle placed into them.<sup>232</sup> Thus, the subject articles “organize, store, protect, or carry food or beverages,” and could not be classified under Heading

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225. *Id.* at 1378-79.

226. *Id.*

227. *Id.* at 1379.

228. *See id.* at 1380.

229. *See id.* at 1376.

230. *See id.* at 1381.

231. *Outer Circle Prods. v. United States*, 602 F. Supp. 2d 1294, 1304 (Ct. Int’l Trade 2009) *rev’d*, 590 F.3d 1323 (Fed. Cir. 2010).

232. *Outer Circle Prods. v. United States*, 590 F.3d 1323, 1326 (Fed. Cir. 2010).

4202, HTSUS.<sup>233</sup> Rather, the CAFC determined that the proper classification was Heading 3924, HTSUS, which provided for “household articles” of plastics.<sup>234</sup>

Similarly, in *storeWALL*, the CIT determined that under the definition of “unit furniture,” a *completed* storeWALL system could be classifiable as unit furniture. However, it also opined that an end user *could* accessorize the wall panels as imported “only with hooks, as opposed to shelves or baskets,” thus rendering the system “merely a rack.”<sup>235</sup> The CIT concluded that because a completed storeWALL system was not always sold in a manner that was “unit furniture,” or designed for exclusively that purpose, the wall panels and tabs were not facially classifiable as parts of furniture.<sup>236</sup> The CIT believed that the imported parts *must be dedicated solely or principally for use with the classified item*.<sup>237</sup>

In reversing this decision, the CAFC found that *from a commercial standpoint*, the end user has the option to add or subtract accessories to the system, and held this to be the very reason that the system was properly classified as unit furniture.<sup>238</sup> Moreover, because the wall panels and tabs were from a practical standpoint dedicated solely for use with the system, the appellate court determined that the CIT “clearly erred by not classifying the products as ‘parts’ of unit furniture.”<sup>239</sup>

Similar to the two previous cases, in *CamelBak*, the CIT believed that the water-carrying and functionality of the packs did not remove them from a classification of travel, sports and similar bags—a provision which included all forms of the named article, even improved forms.<sup>240</sup> The CAFC disagreed and remanded to determine what the essential character of the subject merchandise was—a question of fact that would need to take into account the manner in which the product is used and the manner in which it is sold.<sup>241</sup>

Finally, in *BenQ*, the CIT determined that because the monitors could perform a specific function other than operating in conjunction

233. *Id.*

234. *Id.*

235. *storeWALL, LLC v. United States*, 675 F. Supp. 2d 1200, 1205 (Ct. Int’l Trade 2009), *rev’d*, 644 F.3d 1358 (Fed. Cir. 2011).

236. *Id.*

237. *Id.*

238. *storeWall, LLC v. United States*, 644 F.3d 1358, 1364 (Fed. Cir. 2011).

239. *Id.*

240. *CamelBak Prods., LLC v. United States*, 704 F. Supp. 2d 1335, 1339 (Ct. Int’l Trade 2010), *rev’d*, 649 F.3d 1361 (Fed. Cir. 2011).

241. *CamelBak Prods., LLC v. United States*, 649 F.3d, at 1367-68 (Fed. Cir. 2011).

with a computer (e.g., displaying video from a DVD or other data source), they were to be classified according to that function.<sup>242</sup> Conversely, the CAFC held that the CIT did not conduct a proper principal use analysis and remanded the case to the CIT for it to resolve the issue of whether the monitors were of a kind “solely or principally used in an automatic data processing system.”<sup>243</sup>

It is clear from the above cases that in instances where the CIT’s decision was at odds with the commercial reality and use of the products at issue, the CAFC reversed the CIT’s decision. Additionally, in each of these cases there was an acknowledgement by the CAFC that tariff terms are supposed to be construed in accordance with their common meaning.<sup>244</sup> This is likely because it is presumed that the tariff acts were passed by Congress according to the general usage of the trade<sup>245</sup> and the HTSUS was enacted in the language of commerce.<sup>246</sup> Therefore, absent some clear indication of contrary legislative intent, HTSUS terms are supposed to be construed according to their common, popular, and commercial meaning.<sup>247</sup>

Admittedly, the common meaning of a tariff term is a question of law to be determined by the court.<sup>248</sup> Therefore, when the courts engaged in resolving a dispute between an importer and Customs regarding a tariff term’s meaning, they consulted dictionaries, scientific authorities, and other sources as aids.<sup>249</sup> This was proper and the CIT has traditionally and consistently consulted numerous sources to determine the meaning of a tariff term. Moreover, this consultation is undertaken by the CIT outside of the view proposed by CBP in its administrative rulings or in the papers it files before the court. Additionally, in many of these cases, the court and Customs sought recourse through examination of the Harmonized Commodity Description and

242. *BenQ Am. Corp. v. United States*, 683 F. Supp. 2d 1335, 1340 (Ct. Int’l Trade 2010), *rev’d*, 646 F.3d 1371 (Fed. Cir. 2011).

243. *BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1381 (Fed. Cir. 2011).

244. *See Nippon Kogaku (USA), Inc. v. United States*, 673 F.2d 380, 382 (C.C.P.A. 1982).

245. *See Nylos Trading Co. v. United States*, 37 C.C.P.A. 71, 73 (1949).

246. *See* 19 U.S.C. § 1202 (2006).

247. In order to determine the scope and meaning, the CIT also regularly consults the legislative history. *See Baxter Healthcare Corp. v. United States*, 22 Ct. Int’l Trade 82, 88-89 (1998). However, in the absence of a precise definition appearing in the HTSUS, “the correct meaning of a term is usually resolved by ascertaining its common and commercial meaning.” *Id.*

248. *See Am. Express Co. v. United States*, 39 C.C.P.A. 8, 10 (1951).

249. *See C.J. Tower & Sons of Buffalo, Inc. v. United States*, 673 F.2d 1268, 1271 (C.C.P.A. 1982).

Coding System Explanatory Notes (ENs).<sup>250</sup>

Ultimately, however, recourse to dictionaries or the ENs may be ineffective if those sources fail to take into account new products or the environment in which the imported items are sold. While dictionaries or the ENs may in some instances be helpful, the guidance offered by the notes does not always provide sufficient guidance as a consequence of commercial advances in a particular industry.<sup>251</sup> Ideally, the meaning given to a descriptive term in the tariff is supposed to be that which it had at the time of the law's enactment.<sup>252</sup> However, the CIT appears to have allowed itself in some instances to be boxed in by this requirement. It obviously could not use a subsequent definition to expand the meaning of a tariff term—that definition could not have been contemplated at the statute's enactment. To correct the CIT's errors in the aforementioned cases, the CAFC reversed where it determined that the CIT had made too rigid of a classification decision based on terminology, definitions, or other ideas that failed to take into account the commercial environment and reality of the products at issue.

## VII. CONCLUSION

In the past two years, the CIT's decisions in § 1581(a) cases have covered a wide range of issues that are critical to importers challenging adverse decisions by CBP. This article was intended to advise regular customs practitioners and litigants appearing before the CIT of the court's most recent decisions regarding some of the practical filing requirements and technical aspects of litigation. The remainder of this article was intended to advise customs practitioners of the recent trends in classification litigation—specifically reversals of CIT cases appealed to the CAFC.

In the past two years, classification decisions made as a consequence of motions for summary judgment remained the predominant cases litigated before the CIT. As can be seen from the cases discussed, there appears to be a growing trend by the appellate court to reverse classification cases in which the CIT failed to consider the commercial environment in which the imported products were used and sold.

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250. See *Sparks Belting Co. v. United States*, 715 F. Supp. 2d 1305, 1311 (Ct. Int'l Trade 2010).

251. See, e.g., *Marubeni Am. Corp. v. United States*, 17 Ct. Int'l Trade 360, 361, 368-69 (1993), *aff'd*, 35 F.3d 530 (Fed. Cir. 1994) (highlighting initial difficulties in classifying sports utility vehicles).

252. See *United States v. O. Brager-Larsen*, 36 C.C.P.A. 1, 3-4 (1948).

Specifically, the CAFC appears to reverse in those instances where the CIT has taken insufficient account of the actual use of the products at issue. Accordingly, litigants would be well served in supplying the lower court with sufficient information regarding the marketing and sale of the product at issue in their cases in addition to the product's design—if only to preserve sufficient evidence and information for potential appeals.