

When the Courts Save Parties from Themselves:  
A Practitioner's Guide to the Federal Circuit and the Court of International Trade<sup>¥</sup> <sup>φ</sup> \*

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I. Introduction<sup>1</sup>

Federal courts frequently refuse consider issues not timely raised<sup>2</sup> by the parties. Courts will not consider arguments that parties have waived or forfeited<sup>3</sup>

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<sup>¥</sup> This article represents the author's personal views and is not a document of the U.S. Department of Justice nor does it represent the official views of the Department of Justice.

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<sup>1</sup> I owe much of the content of this article to legal analysis and surveys of legal decisions contained in existing scholarship. *See, e.g.*, Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 Suffolk J. Trial & App. Adv. 179 (2012); Barry A. Miller, *Sua Sponte* Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard, 39 San Diego L. Rev. 1253 (2002); Joan Steinman, Appellate Courts as First Responders: the Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance, 87 Notre Dame L. Rev. 1521 (2012); Robert J. Martineau, Considering New Issues on Appeal: The General Rule and the Gorilla Rule, 40 Vand. L. Rev. 1023 (1987); Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447 (2009); Sarah M. R. Cravens, Involved Appellate Judging, 88 Marq. L. Rev. 251 (2004); William C. Rooklidge and Matthew F. Weil, Judicial Hyperactivity: The Federal Circuit's Discomfort with its Appellate Role, 15 Berkeley Tech. L.J. 725 (2000). The contributions of these articles are greatly appreciated.

<sup>2</sup> For clarity, this article focuses on court consideration of what will be termed "new issues" or "untimely-raised issues," that is, issues not raised timely by the parties, whether the parties raised the arguments late or failed to raise them at all. In entertaining these issues, the court either allows late argument or raises issues *sua sponte*.

and will not address issues *sua sponte*. In particular, appellate courts will not consider issues not passed on by the trial court.<sup>4</sup> Courts will not address arguments not raised in briefs,<sup>5</sup> not sufficiently fleshed-out within the briefs,<sup>6</sup> raised for the

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<sup>3</sup> Many courts and parties refer to the failure to raise arguments timely as “waiver.” However, “forfeiture” is actually the correct term to use in this context. “Waiver” means something slightly different, namely, the affirmative disavowal of a claim or argument. *See Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012) (“A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve.” (citations omitted)); *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (“Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.” (citations, internal quotation marks, and alterations omitted)). *See also Freytag v. Commissioner*, 501 U.S. 868, 895 (1991); *Weigand*, *supra* note 1, at 182-83.

Waiver should also be distinguished from administrative exhaustion; “[a] party does not preserve or waive an issue based on the arguments it presented to an administrative agency; a party merely exhausts that issue before the agency so as to give a court the proper basis to review that issue on appeal or via a complaint.” *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002) (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)). Thus, while the concepts of failure to preserve before the court and failure to exhaust before the agency are similar, they involve different analyses. This article focuses on the former matter.

<sup>4</sup> *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). *See also* *Miller*, *supra* note 1, at 1264-66.

<sup>5</sup> *Miller*, *supra* note 1, at 1266, 1269-71 (discussing *Sanders v. Village of Dixmoor*, 178 F.3d 869 (7th Cir. 1999); *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1214 (7th Cir. 1993)).

<sup>6</sup> *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“A skeletal ‘argument’, really nothing more than an assertion, does not preserve a claim. . . . Especially not when the brief presents a passel of other arguments. . . . Judges are not like pigs, hunting for truffles buried in briefs.”). *See also* *Miller*, *supra* note 1, at 1268. Courts have refused to entertain issues that were raised in footnotes, discussed only in one page or less, or argued without citation to authority. *See Carducci*, 714 F.2d at 177; *AK Steel Corp. v. United States*, No. 98-1233, 1999 U.S. App. LEXIS 15023, at \*12 (Fed. Cir. July 6, 1999) (citing *Braun Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815, 821 (Fed. Cir. 1992)); *United States v. Ford Motor Co.*, 463 F.3d 1267, 1276-77 (Fed. Cir. 2006); *Graphic Controls Corp. v. Utah Med. Prods., Inc.*, 149 F.3d 1382, 1385 (Fed. Cir. 1998); *Miller*, *supra* note 1, at 1268 (collecting cases).

first time in reply briefs,<sup>7</sup> raised for the first time at oral argument,<sup>8</sup> or even if a court determines that a party failed to present an argument at the “first possible time.”<sup>9</sup>

Except when they do. In fact, to either the frustration or the delight of litigants, whether or not to consider untimely-raised issues is left to the court’s discretion.<sup>10 11</sup> This discretion is exercised on a case-by-case basis,<sup>12</sup> in which courts determine whether it is appropriate to consider new issues “under all the circumstances.”<sup>13</sup> And this exercise appears to happen more and more frequently,<sup>14</sup> notably in the Court of Appeals for the Federal Circuit.<sup>15</sup>

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<sup>7</sup> See *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1377 (Fed. Cir. 2000); *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990); Miller, *supra* note 1, at 1268 (citing *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997)).

<sup>8</sup> See Miller, *supra* note 1, at 1268 (citing *Frobose v. Am. Sav. & Loan Ass’n of Danville*, 152 F.3d 602, 612-13 (7th Cir. 1998); *Bank of Ill. v. Over*, 65 F.3d 76, 78 (7th Cir. 1995)).

<sup>9</sup> See Miller, *supra* note 1, at 1268 (citing *Hernandez v. Cowan*, 200 F.3d 995 (7th Cir. 2000); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 790 (7th Cir. 1999)).

<sup>10</sup> *Singleton*, 428 U.S. at 121. See also Weigand, *supra* note 1, at 180-81; Steinman, *supra* note 1, at 1563-64.

<sup>11</sup> Professor Robert Martineau suggests that a court’s discussion of issues *sua sponte* implicates different considerations and analysis than that involved when parties simply fail to timely raise, though ultimately do raise, new issues. See Martineau, *supra* note 1, at 1054. However, it appears – at least to the author of this article – that courts and legal articles have explained no discernible differences between the analyses conducted for these two situations. See Miller, *supra* note 1; Weigand, *supra* note 1; Steinman, *supra* note 1; Frost, *supra* note 1; Cravens, *supra* note 1.

<sup>12</sup> *Singleton*, 428 U.S. at 120; *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1251 (Fed. Cir. 2005).

<sup>13</sup> *Forshey v. Principi*, 284 F.3d 1335, 1358 (Fed. Cir. 2002).

<sup>14</sup> See Martineau, *supra* note 1, at 1025.

<sup>15</sup> This appears so at least within the context of patent litigation. See Rooklidge and Weil, *supra* note 1, at 729-30, 748-50.

As recognized by Professor Martineau and those who follow, the presumption against consideration of untimely-raised issues is not, in many cases, a “general rule” at all.<sup>16</sup>

While the Supreme Court in *Singleton v. Wulff* announced that the “general rule” is that “a federal appellate court should not consider an issue not passed upon below[,]”<sup>17</sup> at the same time the Court held that “[w]e announce no general rule.”<sup>18</sup> The Court noted that appellate courts may address untimely issues in certain situations, including “where the proper resolution is beyond any doubt” or “where ‘injustice might otherwise result.’”<sup>19</sup> As will be discussed further, there are numerous other instances in which courts have addressed new issues. These “exceptions” are applied not only in the context of limited appellate review, but also in the general context of court consideration of issues that parties have failed to timely raise.<sup>20</sup>

Whether a court will address an untimely-raised issue is “a question with no certain answer.”<sup>21</sup> This is because courts usually provide little or no reasoning to support their choices to either consider or ignore new issues.<sup>22</sup> Previous surveys of legal determinations reflect that if a court refuses to entertain the new issue, it will likely simply cite to the “general rule” without further discussion.<sup>23</sup> When choosing

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<sup>16</sup> Martineau, *supra* note 1, at 1044, 1058; Miller, *supra* note 1, at 1278-79. Professor Martineau re-names the presumption as the “gorilla rule.” Martineau, *supra* note 1, at n. \*. That is, just as an 800-pound gorilla sleeps “anywhere it wants,” so too an appellate court considers new issues “any time it wants.” *Id.*

<sup>17</sup> 28 U.S. at 120.

<sup>18</sup> *Id.* at 121. Although the Court shied away from a “general rule,” for purposes of the discussion, this article will nonetheless refer to the presumption against consideration of untimely issues as a “general rule.”

<sup>19</sup> *Id.* (citing *Turner v. City of Memphis*, 369 U.S. 350, 557 (1962)); *Hormel*, 312 U.S. 552).

<sup>20</sup> See generally Miller, *supra* note 1.

<sup>21</sup> *Essinger v. Liberty Mut. Fire Ins. Co.*, 534 F.3d 450, 453 (5th Cir. 2008). See Weigand, *supra* note 1, at 220.

<sup>22</sup> Martineau, *supra* note 1, at 1034, 1052, 1058; Weigand, *supra* note 1, at 246-47; Cravens, *supra* note 1, at 273; Miller, *supra* note 1, at 1286-88.

<sup>23</sup> Martineau, *supra* note 1, at 1034 (collecting cases), 1058; Weigand, *supra* note 1, at 246-47 (collecting cases).

to address the new issue, courts will often make conclusory statements that an exception to the “general rule” applies without providing the rationale underlying the use of the exception.<sup>24</sup> As a result, to some, the *ad hoc* nature of court practice reflects courts’ unmeasured discretion<sup>25</sup> to consider new issues “any time [they] want.”

This article provides a practitioner’s perspective on federal court behavior in general, and actions of the Federal Circuit and Court of International Trade (CIT) in particular, in addressing issues untimely-raised before the court. While not seeking to constitute a comprehensive report of or theoretical explanation for judicial decision-making in this respect, I attempt to shed light on current realities of litigation.

At bottom, despite the courts’ attempts to develop distinct “exceptions” to the rule against reaching new issues, most “exceptions” are ambiguous or can be applied so broadly that they swallow the “general rule.” As a result, court practice in entertaining such issues is unpredictable, inconsistent, and, sometimes, unfair.

#### I. Background: Instances in Which the Federal Courts Will Reach New Issues

Courts do attempt to provide a framework within which to exercise their discretion. Courts repeatedly state that they will address arguments not previously raised by the parties only in “exceptional” circumstances.<sup>26</sup> Further, courts have enumerated specific instances or factors that will militate in favor of consideration of new issues. Unfortunately, in both judicial opinions and legal scholarship, the analysis and exceptions derived therefrom are confusing, inconsistent, and comingled.<sup>27</sup> Nevertheless, I have attempted to collect the most common of the factors going into courts’ analyses and instances in which courts will consider issues not timely raised.<sup>28</sup>

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<sup>24</sup> Martineau, *supra* note 1, at 1034 (collecting cases), 1058; Weigand, *supra* note 1, at 181, 246-47 (collecting cases).

<sup>25</sup> Miller, *supra* note 1, at 1287.

<sup>26</sup> See, e.g., *Hormel*, 312 U.S. at 557. See also Weigand, *supra* note 1, at 181; Steinman, *supra* note 1, at 1563-64.

<sup>27</sup> See Weigand, *supra* note 1, at 256-57.

<sup>28</sup> I note that many of these “exceptions” or “factors” may rely upon the existence of other “exceptions” or “factors”; in other words, each of these mentioned below is not necessarily outcome determinative.

## A. Uncontroversial Exceptions

There are some exceptions to the general rule that are predictable enough that their use is usually unproblematic.

### i. Subject Matter Jurisdiction

That a court or the parties may raise the issue of subject matter jurisdiction at any time during the litigation is fairly uncontroversial.<sup>29</sup> Before addressing the merits of any case, it is “central to the legal process”<sup>30</sup> that federal courts must satisfy themselves that the requirements of Article III of the Constitution are met to preserve the federal judiciary’s “limited role in the constitutional structure.”<sup>31</sup> As a result, courts consider new issues implicating, among others, standing<sup>32</sup> and ripeness.<sup>33</sup>

But many jurisdictional questions involve factual disputes which in certain cases would necessitate an appellate court remand to the trial court.<sup>34</sup> Moreover, the line between jurisdictional and non-jurisdictional issues is fuzzy.<sup>35</sup> Courts tend to disagree as to which doctrines implicate jurisdiction and which do not, for example, political questions,<sup>36</sup> the existence of “final agency action” to satisfy the

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<sup>29</sup> Weigand, *supra* note 1, at 259-60; Miller, *supra* note 1, at 1280; Cravens, *supra* note 1, at 264; Martineau, *supra* note 1, at 1045-47; Steinman, *supra* note 1, at 1554, 1576-80; Frost, *supra* note 1, at 462. See *Capron v. Van Noorden*, 2 Cranch (6 U.S.) 126 (1804) (holding that the court must satisfy itself that it has subject matter jurisdiction and cannot allow parties to make that determination).

<sup>30</sup> Martineau, *supra* note 1, at 1045.

<sup>31</sup> *Consol. Coal Co. v. United States*, 351 F.3d 1374, 1378 (Fed. Cir. 2003) (citing *Broughton Lumber Co. v. Yeutter*, 939 F.2d 1547, 1555 (Fed. Cir. 1991)); Steinman, *supra* note 1, at 1576. See also Frost, *supra* note 1, at 462; Martineau, *supra* note 1, at 1045-46; Weigand, *supra* note 1, at 261-62.

<sup>32</sup> See Miller, *supra* note 1, at 1280 (collecting cases); Weigand, *supra* note 1, at 260 (collecting cases).

<sup>33</sup> See Miller, *supra* note 1, at 1280 (collecting cases); Weigand, *supra* note 1, at 260 (collecting cases).

<sup>34</sup> See Steinman, *supra* note 1, at 1576-77.

<sup>35</sup> *Id.* at 1580.

<sup>36</sup> See *Schroder v. Bush*, 263 F.3d 1169, 1171 n.1 (10th Cir. 2001) (“[d]eeply rooted ambiguity in the nature and justification of the political question doctrine

Administrative Procedure Act,<sup>37</sup> and the like. Thus, at least one legal scholar has opined that the dichotomy between jurisdictional and non-jurisdictional issues is false or, at least, not useful.<sup>38</sup> The distinction is arguably not all that important for, as noted below, courts will often entertain non-jurisdictional issues that go to the courts' competence to hear the case.

ii. Issue of Judicial Competence

Though Article III does not necessarily compel courts to do so, as an exercise of judicial restraint and to preserve judicial resources,<sup>39</sup> courts sometimes will entertain quasi-jurisdictional issues.<sup>40</sup> These issues also go to the heart of the court's competence to address the issue at hand. Courts therefore address new questions of qualified immunity,<sup>41</sup> issue and claim preclusion,<sup>42</sup> abstention or avoidance of constitutional issues,<sup>43</sup> comity,<sup>44</sup> and the propriety or scope of an injunction or consent decree.<sup>45</sup>

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has prevented clear classification of the appropriate type of dismissal in political question cases." (citation omitted)).

<sup>37</sup> See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 515 F.3d 1372, 1379-80 (Fed. Cir. 2008) ("Our case law is arguably inconsistent about whether a finding that a court does not have authority to grant the relief requested should be considered jurisdictional.").

<sup>38</sup> See Steinman, *supra* note 1, at 1580.

<sup>39</sup> See Frost, *supra* note 1, at 462-63.

<sup>40</sup> See Martineau, *supra* note 1, at 1047-51.

<sup>41</sup> See Cravens, *supra* note 1, at 265 (collecting cases); Steinman, *supra* note 1, at 1583-85 (discussing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). *But see* Martineau, *supra* note 1, at 1049-50.

<sup>42</sup> See Frost, *supra* note 1, at 462 (collecting cases).

<sup>43</sup> See *id.* (collecting cases); Miller, *supra* note 1, at 1281 (collecting cases); Cravens, *supra* note 1, at 265 (collecting cases); Martineau, *supra* note 1, at 10-50-51. Thus, courts will often raise new statutory issues to avoid deciding a constitutional question. See Martineau, *supra* note 1, at 1050-51.

<sup>44</sup> See Miller, *supra* note 1, at 1281 (collecting cases).

<sup>45</sup> See *id.* (collecting cases).

Most jurisdictional or quasi-jurisdictional issues are discrete and observable, such that the courts' discretion to reach these issues is to a large degree predictable and consistent. It is thus well-accepted that courts will consider these issues at all stages of the litigation, whether or not presented by the parties.

iii. *Pro Se* Litigants

Courts liberally construe arguments of *pro se* litigants<sup>46</sup> and, accordingly, are more likely to consider untimely raised issues.<sup>47</sup> However, frivolous cases are often dismissed *sua sponte*.<sup>48</sup>

iv. Changes In Law Or Facts

Courts will hear new issues if there has been a change in law,<sup>49</sup> either by statute<sup>50</sup> or by judicial decision.<sup>51</sup> As to the latter circumstance, courts have clarified that, in order for a court to apply this exception, the jurisprudence must have been "well-settled" such that "any attempt to challenge it would have appeared pointless."<sup>52</sup> Further, while a party may not raise tardily an issue overturned by new law,<sup>53</sup> the court nonetheless has the responsibility to apply the current law to that issue.<sup>54</sup>

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<sup>46</sup> *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).

<sup>47</sup> See *Miller*, *supra* note 1, at 1285; *Cravens*, *supra* note 1, at 265.

<sup>48</sup> See *Miller*, *supra* note 1, at 1282.

<sup>49</sup> *Patterson*, 294 U.S. at 607; *Steinman*, *supra* note 1, at 1559; *Weigand*, *supra* note 1, at 268-69.

<sup>50</sup> *Forshey v. Principi*, 284 F.3d 1335, 1355-56 (Fed. Cir. 2002) (citing *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 270 (1994); *Weigand*, *supra* note 1, at 269).

<sup>51</sup> *Hormel*, 312 U.S. at 558-59; *Forshey*, 284 F.3d at 1356; *Kattan v. Dist. of Columbia*, 995 F.2d 274, 277 (D.C. Cir. 1993)); *Miller*, *supra* note 1, at 1300; *Weigand*, *supra* note 1, at 269.

<sup>52</sup> *Forshey*, 284 F.3d at 1356 (quoting *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994)). See also *Kattan*, 995 F.2d at 276.

<sup>53</sup> See *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (citing *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1495-96 (11th Cir. 1990)).

<sup>54</sup> *Forshey*, 284 F.3d at 1356-57 (discussing *Kamen*, 500 U.S. at 92, 94-95, 99); see also *id.* at 1356 n.19 (quoting *United States v. Fitzgerald*, 545 F.2d 578, 582 (11th Cir. 1976)).

Some courts go further and will hear new issues when *facts* have changed during the pendency of the proceedings, even if the case is on appeal.<sup>55</sup> This practice is particularly problematic in administrative record cases, in which the agency builds the record<sup>56</sup> and finds facts based on the information contained in that record.<sup>57</sup>

B. Broad or Ambiguous Exceptions

However, there are many exceptions or factors considered by the courts that lend themselves toward virtually unconfined court discretion.

i. Issue Goes to Governmental Structure

The Supreme Court has entertained new issues that go to “fundamental principles of the structure of the federal government[.]”<sup>58</sup> For example, the Court has rejected, on the merits, post-judgment challenges to the validity of a federal court decision rendered by a panel including a judge sitting by designation.<sup>59</sup>

ii. New Argument Rather than a New Claim

The Supreme Court has also distinguished between bringing a new “claim” before the court, which is not allowed absent an exception,<sup>60</sup> and bringing a new “argument” before the court, which often is.<sup>61</sup> As the Supreme Court held in *Kamen v. Kemper Financial Services*,<sup>62</sup> if a claim is timely raised, “the court is not limited to

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<sup>55</sup> See Miller, *supra* note 1, at 1282, 1300; Steinman, *supra* note 1, at 1559, 1564.

<sup>56</sup> See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

<sup>57</sup> See *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966).

<sup>58</sup> Steinman, *supra* note 1, at 1582-83.

<sup>59</sup> *Id.* (discussing *Glidden v. Zdanok*, 370 U.S. 530 (1962)). See also *Ninestar Tech. Co. v. Int’l Trade Comm’n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012) (addressing but rejecting a challenge to the ability of the Commission – a non-judicial body – to assess penalty that is “criminal in nature,” implicating a potential violation of separation of powers).

<sup>60</sup> Cravens, *supra* note 1, at 256; Frost, *supra* note 1, at 476.

<sup>61</sup> See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 382-83 (1995).

<sup>62</sup> 500 U.S. 90 (1991). For more detailed discussion on this case, see Cravens, *supra* note 1, at 258-61.

the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”<sup>63</sup> Following *Kamen*, in cases like *Lebron v. National Railroad Passenger Corp.*, the Court has determined that if a claim is properly before the court, the court may consider any number of new arguments or theories underlying that claim.<sup>64</sup>

Not surprisingly, where a “claim” ends and an “argument” begins may be difficult to understand or predict.<sup>65</sup> And courts have not consistently drawn this line.<sup>66</sup>

But despite ambiguity, courts consider new issues that are “inextricably” “linked”<sup>67</sup> or “intertwined”<sup>68</sup> with the issue at hand, involve “antecedent”<sup>69</sup> or

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<sup>63</sup> *Kamen*, 500 U.S. at 99 (citing *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)).

<sup>64</sup> *Lebron*, 513 U.S. at 382-83 (quoting *Yee v. Escondido*, 503 U.S. 519 (1992)). See also *Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993). It should be noted that the nomenclature used by legal scholars to explain the claim/argument dichotomy is confusing. Cravens distinguishes between “issues” and “claims” on the one hand, and “theories,” “arguments,” “frameworks,” and “legal reasons” on the other. Cravens, *supra* note 1, at 257. Professor Steinman distinguishes between “issues” and “arguments” or “theories.” Steinman, *supra* note 1, at 1526. Miller distinguishes between “theories” and “points.” Miller, *supra* note 1, at 1278. Professor Frost distinguishes between “claims” or “theories” and “arguments.” Frost, *supra* note 1, at 476. However, despite the language used in this article, I refer in this section to federal courts’ identification and treatment of the latter category, and the courts’ application of the “correct” law thereto.

<sup>65</sup> See Miller, *supra* note 1, at 1278 (citing Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved*, 7 Wis. L. Rev. 91, 97-98 (1932)); Steinman, *supra* note 1, at 1526-27.

<sup>66</sup> See Cravens, *supra* note 1, at n. 21 (noting the inconsistency specifically in the Supreme Court).

<sup>67</sup> *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005).

<sup>68</sup> See Steinman, *supra* note 1, at 1561.

<sup>69</sup> See *U.S. Nat’l Bank of Ore. v. Indep. Agents of Am., Inc.*, 508 U.S. 439, 447 (1990); *Arcadia*, 498 U.S. at 77); Cravens, *supra* note 1, at 259; Miller, *supra* note 1, at 1282.

“predicate”<sup>70</sup> questions of law that are “essential to the analysis,”<sup>71</sup> “ultimately dispositive of,”<sup>72</sup> or “necessary to the resolution of other issues directly before it on appeal,”<sup>73</sup> and, arguably, even what the court considers to be related legal issues.<sup>74</sup> Courts often invoke this exception to avoid applying the wrong law to the case even if that law has been proposed by the parties or relied on in court decisions below,<sup>75</sup> or to reach an argument that “goes to the heart of the claims on which they must rule.”<sup>76</sup>

### iii. The Proper Resolution is Beyond Any Doubt

Courts will address a new question if the answer is “clear”<sup>77</sup> or “the proper resolution is beyond any doubt.”<sup>78</sup> In this situation, appellate courts will not remand, because they have determined that they would not benefit from trial court

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<sup>70</sup> *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 518 F.3d 1353, 1359 n.5 (Fed. Cir. 2008). *See also Kamen*, 500 U.S. at 99-100 & n.5 (reversing the appellate court’s finding of forfeiture when appellant merely asserted federal law until her reply brief in proceedings below, because the court needed to address extent of state law before could identify federal law; otherwise the decision would rest upon a “truncated body of law”).

<sup>71</sup> *City of Sherrill*, 544 U.S. at 214 n.8 (quoting R. Stern, et al., *Supreme Court Practice* 424 (8th ed. 2002)).

<sup>72</sup> *Nat’l Bank of Or.*, 508 U.S. at 447; *Arcadia*, 498 U.S. at 77.

<sup>73</sup> *Cordis Corp. v. Boston Sci. Corp.*, 658 F.3d 1347, 1359 (Fed. Cir. 2011) (citing *Pfizer, Inc.*, 518 F.3d at 1359 n.5; *Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1244-45 (Fed. Cir. 2007); U.S. Supreme Ct. Rule 14.1(a)). *See Weigand, supra* note 1, at 219; *Miller, supra* note 1, at 1276; *Steinman, supra* note 1, at 1561.

<sup>74</sup> *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 540 (1999) (new issue “intimately bound up” with and “easily subsumed within” the Court’s analysis). *See also Miller, supra* note 1, at 1286.

<sup>75</sup> *Kamen*, 500 U.S. at 99; *Forshey*, 284 F.3d at 1356-57 (discussing *Kamen*, 500 U.S. at 92, 94-95, 99); *Miller, supra* note 1, at 1276.

<sup>76</sup> *Frost, supra* note 1, at 476.

<sup>77</sup> *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962).

<sup>78</sup> *Singleton*, 428 U.S. at 121 (citing *Turner*, 369 U.S. 350)). *See also Weigand, supra* note 1, at 274; *Martineau, supra* note 1, at 1040; *Steinman, supra* note 1, at 1572-73.

determination.<sup>79</sup> It goes without saying that this consideration itself is far from clear.<sup>80</sup>

iv. “Plain” or “Basic” or “Fundamental” Error<sup>81</sup>

In accordance with the “plain error” exception, a court will consider issues not passed on by the trial court “if a plain error was committed in a matter so absolutely vital” to a party that the court “feels [itself] at liberty to correct it.”<sup>82</sup> This exception derives originally from criminal procedure<sup>83</sup> but courts have applied the exception to civil cases as well,<sup>84</sup> though considerably less often.<sup>85</sup> The Supreme Court has cautioned that this exception is to be used “exceptional circumstances,” when “(1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”<sup>86</sup> This is a case-specific, fact-based inquiry.<sup>87</sup>

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<sup>79</sup> Weigand, *supra* note 1, at 274; Martineau, *supra* note 1, at 1040; Steinman, *supra* note 1, at 1572, 1574-75.

<sup>80</sup> Miller cynically notes that “[c]ourts are more likely to raise a new issue without briefing if there is little additional work involved.” Miller, *supra* note 1, at 1284 (citing Allan D. Vestal, *Sua Sponte* Consideration in Appellate Review, 27 Fordham L. Rev. 477 (1958-59)).

<sup>81</sup> Martineau, *supra* note 1, at 1033, 1052-56.

<sup>82</sup> *Wiborg v. United States*, 163 U.S. 632, 658 (1896).

<sup>83</sup> Martineau, *supra* note 1, at 1052 (discussing *United States v. Atkinson*, 297 U.S. 157 (1936)).

<sup>84</sup> Miller, *supra* note 1, at 1283; Weigand, *supra* note 1, at 194 (discussing *Atkinson*, 297 U.S. 157). In fact, Professor Martineau appears to consider the “plain error” exception inapplicable to civil cases. Martineau, *supra* note 1, at 1052-53, 1055-56.

<sup>85</sup> Weigand, *supra* note 1, at 217 (collecting cases).

<sup>86</sup> *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (citing *Puckett v. United States*, 556 U.S. 129, 142 (2009) (internal quotation marks omitted); *United States v. Olano*, 507 U.S. 725, 731-37 (1993); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002)). See also *Atkinson*, 297 U.S. at 160 (plain error exists when “the errors were obvious, or if the otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”).

Given its *ad hoc* nature, the “plain error” exception has been criticized as “[having] expanded into a roving commission for appellate judges to seek out and correct error wherever it can be found.”<sup>88</sup>

v. Pure Question of Law Needing No Factual Development

Courts will consider new issues if they constitute purely legal issues and require no further development of facts.<sup>89</sup> Such purely legal issues include the construction of statutory provisions,<sup>90</sup> the applicability of constitutional provisions, statutes, or legal doctrines,<sup>91</sup> the reconsideration of existing precedent,<sup>92</sup> and the extent of the retroactivity of a court decision.<sup>93</sup> Of course, the lines between purely legal questions, mixed questions of law and fact, and purely factual questions can at times be difficult to draw.<sup>94</sup>

Relatedly, courts have addressed new issues even if not purely legal questions if the record is adequately developed.<sup>95</sup> But whether courts can fully and confidently determine whether the factual record is complete is an open question.<sup>96</sup>

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<sup>87</sup> Weigand, *supra* note 1, at 196 (quoting *Puckett v. United States*, 556 U.S. 129, 142 (2009)).

<sup>88</sup> Martineau, *supra* note 1, at 1052.

<sup>89</sup> See, e.g., *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5, (D.C. Cir. 1992); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1030 (5th Cir. 1982). See also Martineau, *supra* note 1, at 1035-37; Miller, *supra* note 1, at 1281-82; Weigand, *supra* note 1, at 266; Steinman, *supra* note 1, at 1564, 1568-72. The reader will note the similarity of this exception to the “pure question of law” exception to the rule of administrative exhaustion. See *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007).

<sup>90</sup> *CEMEX, S.A. v. United States*, 133 F.3d 897, 902 (Fed. Cir. 1998); Martineau, *supra* note 1, at 1035.

<sup>91</sup> Martineau, *supra* note 1, at 1035.

<sup>92</sup> Miller, *supra* note 1, at 1282.

<sup>93</sup> *Id.*

<sup>94</sup> Steinman, *supra* note 1, at 1568 (“the slipperiness of the slope between questions of law and mixed questions of law is notorious, and even the reality of the distinction between law and fact has been questioned.” (footnotes omitted)).

<sup>95</sup> Weigand, *supra* note 1, at 264.

vi. Constitutional Issue

Courts will reach arguments that raise constitutional issues<sup>97</sup> or issues of “constitutional magnitude.”<sup>98</sup> But this tendency conflicts with the doctrine of abstention, which states that courts should avoid, whenever possible, questions of the constitutionality of state or federal statutes.<sup>99</sup> Thus, courts will also deem the constitutional nature of the issue as a reason *not* to consider it.<sup>100</sup>

vii. Important Or Novel Issue Certain To Arise In Other Cases

When faced with what the court considers to be a “novel” or “important”<sup>101</sup> issue of law, or a question of law “currently in a state of evolving definition and

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<sup>96</sup> Steinman, *supra* note 1, at 1568.

<sup>97</sup> See, e.g., *Nelson v. Adams*, 529 U.S. 460, 469-70 (2000); *Ninestar*, 667 F.3d at 1382; *Consol. Coal*, 351 F.3d at 1378; Martineau, *supra* note 1, at 1044 (collecting cases); Weigand, *supra* note 1, at 279 (collecting cases). See also *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972) (“courts indulge every reasonable presumption against waiver” of fundamental rights) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393(1937)).

<sup>98</sup> Steinman, *supra* note 1, at 1564 (quoting *Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 125 (1st Cir. 2010)).

<sup>99</sup> See *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011); *Hooper v. California*, 155 U.S. 648, 657 (1895). See also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>100</sup> See *Smith v. Principi*, 34 F. App'x 721, 725 (Fed. Cir. 2002) (“Constitutional issues in particular call forth a quality and depth of consideration not necessarily present in more ordinary appeals”); Weigand, *supra* note 1, at 279 (noting that many courts see constitutional issues as subject to forfeiture or, indeed, hold that “a constitutional issue is usually of greater magnitude than other claimed errors demanding consideration in the exceptional circumstances rubric” and that “the general rule of waiver/forfeiture applies with particular force to constitutional issues raised for the first time on appeal.”) (citing *Yakus v. United States*, 321 U.S. 414, 444 (1944)).

<sup>101</sup> *City of Newport v. Fact Concerts*, 453 U.S. 247, 256 (1981); Miller, *supra* note 1, at 1282. These issues include those of “general impact” or “great public concern.” *Ninestar*, 667 F.3d at 1382 (quoting *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1345 (Fed. Cir. 2001)); *CEMEX*, 133 F.3d at 902; *L.E.A. Dynatech, Inc. v. Allina*, 49 F.3d 1527, 1531 (Fed. Cir. 1995).

uncertainty”<sup>102</sup> that is “certain” or “likely” to recur<sup>103</sup> in future cases, the court sometimes will reach that issue even if parties have not timely raised it.<sup>104</sup>

But scholars have noted that if an issue is truly certain to recur, that should be all the more reason to leave the issue for another case in which parties properly raise the issue.<sup>105</sup> Some argue that the court can benefit from the parties’ analysis<sup>106</sup> as well as lower court consideration of novel issues.<sup>107</sup> Perhaps most troublesome is the fact that which issues are “important” vary among judges, and decisions thus are or may appear to be “nakedly political.”<sup>108</sup>

#### viii. Issue of Public Interest

When courts determine that consideration of the issue is in the public interest,<sup>109</sup> or implicates issues of public policy,<sup>110</sup> they will at times address that

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<sup>102</sup> *City of Newport*, 453 U.S. at 256.

<sup>103</sup> See *id.* at 257; Martineau, *supra* note 1, at 1035 (citing *United States v. Krynicki*, 689 F.2d 289 (1st Cir. 1982)), 1040; Weigand, *supra* note 1, at 278 (citing *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 40 (D.C. Cir. 2011)). See also *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988); *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 419 n.5 (D.C. Cir. 1992) (citing *City of Newport*, 453 U.S. at 255-57).

<sup>104</sup> See Steinman, *supra* note 1, at 1563 (quoting *Salazar ex rel. Salazar v. Dist. of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010) (quoting *Flynn v. Commissioner*, 269 F.3d 1064, 1069 (D.C. Cir. 2001))); Weigand, *supra* note 1, at 199 (citing *City of Newport*, 453 U.S. at 257), 277 (citing *Exxon Mobil Corp.*, 654 F.3d at 40), 278 (citing *Exxon Mobil Corp.*, 654 F.3d at 40).

<sup>105</sup> Martineau, *supra* note 1, at 1041.

<sup>106</sup> *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983); *Playboy Enters. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997).

<sup>107</sup> Weigand, *supra* note 1, at 282. See *Dist. of Columbia v. Air Fla.*, 750 F.2d 1077, 1085 (D.C. Cir. 1984). Cf. *Israel Bio-Eng’g v. Amgen Inc.*, 475 F.3d 1256, 1265 (Fed. Cir. 2007).

<sup>108</sup> Miller, *supra* note 1, at 1306-07.

<sup>109</sup> See Frost, *supra* note 1, at 463 (citing *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8 (4th Cir. 1995)); Steinman, *supra* note 1, at 1564; Weigand, *supra* note 1, at 265, 275.

<sup>110</sup> *Nuelsen v. Sorensen*, 293 F. 2d 454, 462 (9th Cir. 1961); *Cont’l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988); Cravens, *supra* note 1, at 265

new issue. Similar to the cases invoking “important” legal issue exception, there is little guidance as to which issues fall under this category. The ambiguity of the exception leaves much to whim of the presiding judge or judges.

ix. Notice of the Issue

If the new argument was not previously known to the parties, courts have reached the argument.<sup>111</sup> Similarly, a court may choose not to reach the issue, if a party was on notice of the issue and did not timely raise it.<sup>112</sup>

At the same time, however, often courts will look at new issues if the courts determine that the parties were on notice of the issues<sup>113</sup> or the lower courts considered or were on notice of the issues.<sup>114</sup> If the issue was briefed adequately by the parties, courts will often entertain new issues.<sup>115</sup> Courts will address new arguments if briefed, at least partially, even by non-parties, *e.g.*, *amici*, before the court.<sup>116</sup> Courts have also reached untimely issues if they are discussed at least at oral argument.<sup>117</sup>

As is no doubt obvious to the reader, these exceptions seemingly cover all cases.

x. To Avoid Injustice

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(citing *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1373 (Fed. Cir. 2001)); Weigand, *supra* note 1, at 219.

<sup>111</sup> See Weigand, *supra* note 1, at 268.

<sup>112</sup> See *Ad Hoc Comm. of AZ-NM-TX-FL Prods. of Gray Portland Cement v. United States*, No. 95-1485, 1996 U.S. App. LEXIS 19074, at \*5-6 (Fed. Cir. Aug. 1, 1996).

<sup>113</sup> *Consol. Coal*, 351 F.3d at 1378. *But see Amoco Oil*, 234 F.3d at 1377 (argument forfeited although adverse party briefed in its response).

<sup>114</sup> *Nelson*, 529 U.S. at 469, 470; *Lebron*, 513 U.S. at 379 (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)); *Consol. Coal*, 351 F.3d at 1378; *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1359 (Fed. Cir. 2006); Cravens, *supra* note 1, at 256; Miller, *supra* note 1, at 1279.

<sup>115</sup> See Weigand, *supra* note 1, at 263.

<sup>116</sup> See Miller, *supra* note 1, at 1284.

<sup>117</sup> See *Nelson*, 529 U.S. at 469-70; Miller, *supra* note 1, at 1284.

More broadly, and encompassing many of the factors/exceptions listed above, courts will reach new issues to avoid injustice to either party. Much legal scholarship has been dedicated to this exception, and the confines of this exception are far from clear. The exception is not defined<sup>118</sup> and has many formulations: “miscarriage of justice,”<sup>119</sup> “substantial risk of miscarriage of justice,”<sup>120</sup> “manifest injustice,”<sup>121</sup> “inconsistent with substantial justice,”<sup>122</sup> “interest of substantial justice,”<sup>123</sup> “interests of justice,”<sup>124</sup> “injustice otherwise might result,”<sup>125</sup> or “as justice requires.”<sup>126</sup> Courts derive this exception from the Supreme Court’s broad pronouncement in *Hormel* and *Singleton* that a court may reach an unpreserved issue “where injustice might otherwise result.”<sup>127</sup> In practice, the “injustice” exception can amount to consideration of new issues when those issues are outcome determinative or amount to reversible error,<sup>128</sup> arguably making the words underlying the exception “almost meaningless.”<sup>129</sup> Therefore, as it allows for substantial judicial discretion, the “injustice” exception may be “most open to manipulation of all.”<sup>130</sup>

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<sup>118</sup> Weigand, *supra* note 1, at 274; Martineau, *supra* note 1, at 1041.

<sup>119</sup> Weigand, *supra* note 1, at 218, 274; Steinman, *supra* note 1, at 1563-64; Martineau, *supra* note 1, at 1035.

<sup>120</sup> Weigand, *supra* note 1, at 218, 276.

<sup>121</sup> *Id.* at 218, 274.

<sup>122</sup> Miller, *supra* note 1, at 1285.

<sup>123</sup> Weigand, *supra* note 1, at 221 (quoting *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984)).

<sup>124</sup> *Id.* at 218; Miller, *supra* note 1, at 1285.

<sup>125</sup> Steinman, *supra* note 1, at 1573-74.

<sup>126</sup> *Patterson v. Alabama*, 294 U.S. 600, 607 (1935).

<sup>127</sup> *Hormel*, 312 U.S. at 557; *Singleton*, 428 U.S. at 121.

<sup>128</sup> Martineau, *supra* note 1, at 1042; Miller, *supra* note 1, at 1285. *But see Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 628 n.5 (1st Cir. 1995) (requiring “more than the individualized harm that occurs whenever the failure seasonably to raise a claim or defense alters the outcome of a case.”).

<sup>129</sup> Miller, *supra* note 1, at 1285.

<sup>130</sup> *Id.* at 1307.

### C. Case-Specific Considerations

There are factors that courts will consider that deal not with the specific issue at hand, but instead focus on the posture of the case or the status of the parties.

#### i. Adverse Party Cannot Show Prejudice

If the adverse party cannot demonstrate that it is prejudiced by the court's consideration of the new issue, the court is more likely to reach that issue.<sup>131</sup> Yet, as others have noted, mandating that the adverse party to show prejudice requires that party to speculate as to how the matter may have otherwise developed, when, indeed, "[d]efeats rather than victory is the ultimate prejudice."<sup>132</sup>

#### ii. Adverse Party Did Not Timely Object

If the adverse party does not object to new issues on grounds of waiver, forfeiture, or the like, courts often consider those issues.<sup>133</sup> This makes sense as a procedural matter, as waiver constitutes an affirmative defense,<sup>134</sup> but, conceptually, it is difficult to understand how it is fair that the court punishes one party and rewards the other.

#### iii. Procedural Posture of the Case

Whether or not a court will entertain untimely arguments can depend on the procedural posture of the matter. Appellate courts often raise other grounds to affirm the decision below.<sup>135</sup> Courts may also address new issues if the trial court

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<sup>131</sup> *Pfizer*, 518 F.3d at 1359 n.5; Martineau, *supra* note 1, at 1037-40; Weigand, *supra* note 1, at 263, 265.

<sup>132</sup> Martineau, *supra* note 1, at 1038.

<sup>133</sup> See *Navajo Nation v. United States*, 501 F.3d 1327, 1337 (Fed. Cir. 2007); Steinman, *supra* note 1, at 1589 (discussing *City of Okla. City v. Tuttle*, 471 U.S. 808, 815-16 (1985)).

<sup>134</sup> See Fed. R. Civ. P. 8(c)(1).

<sup>135</sup> See Steinman, *supra* note 1, at 1562, 1593; Cravens, *supra* note 1, at 270; Miller, *supra* note 1, at 1283.

proceedings are in the early stages,<sup>136</sup> or to speed up already prolonged or delayed litigation.<sup>137</sup>

iv. The Party's Inability to Previously Raise the Argument

Courts, when exercising their discretion to hear new arguments, take into consideration whether the argument could have been raised at an earlier point in the litigation. If the relevant party had no earlier opportunity to raise the argument,<sup>138</sup> or if raising the argument at an earlier time would have been a futile exercise,<sup>139</sup> courts use this exception.<sup>140</sup>

v. The Party's Reasons for Failure to Raise the Argument

If a party has not timely raised an argument, and that failure results from inadvertence,<sup>141</sup> a court is more likely to entertain the new argument than if the tardiness was due to a party's tactical decision.<sup>142</sup> The court is more likely to reject a new argument, and estop the party from making that argument, when the party took an opposite position previously in the litigation.<sup>143</sup>

D. Because the Court Wants To!

Perhaps there is really no rhyme or reason to explain the courts' exercise of its discretion.<sup>144</sup> The exceptions are so vague that I find it difficult to concoct a

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<sup>136</sup> See Miller, *supra* note 1, at 1284.

<sup>137</sup> See Weigand, *supra* note 1, at 220.

<sup>138</sup> See *id.* at 268; *In re Novack*, 639 F.2d 1274, 1277 (5th Cir. 1981) (citing Fed. R. Civ. P. 46).

<sup>139</sup> Weigand, *supra* note 1, at 268.

<sup>140</sup> These exceptions are also used in the context of administrative exhaustion. See, e.g., *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007).

<sup>141</sup> Weigand, *supra* note 1, at 270.

<sup>142</sup> *Becton Dickinson*, 922 F.2d at 800; Weigand, *supra* note 1, at 270.

<sup>143</sup> Weigand, *supra* note 1, at 271.

<sup>144</sup> See Martineau, *supra* note 1, at 1061; Miller, *supra* note 1, at 1286 (discussing *United States v. Feola*, 420 U.S. 671 (1975)).

scenario in which one of them could not potentially apply. As one skeptic has determined, courts are more likely to reach an issue “if they think a case is really important or if the judges really want to reach a particular result.”<sup>145</sup>

## II. Practice Before the Federal Circuit<sup>146</sup>

Naturally, the Federal Circuit has addressed new issues involving jurisdiction.<sup>147</sup> But the Federal Circuit has announced and applied – in a summary manner – strong rules of forfeiture and waiver. First, issues not raised in an opening brief<sup>148</sup> or sufficiently briefed<sup>149</sup> are “waived.” Second, issues not raised in the court proceedings below are “waived.”<sup>150</sup>

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<sup>145</sup> Miller, *supra* note 1, at 1287.

<sup>146</sup> This analysis of cases in the Federal Circuit is limited rulings made in writing on the record.

<sup>147</sup> See, e.g., *Diggs v. HUD*, 670 F.3d 1353, 1355 (Fed. Cir. 2011); *SKF USA Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1347-48 (Fed. Cir. 2009); *Fuji Photo Film Co. v. Int’l Trade Comm.*, 474 F.3d 1281, 1289 (Fed. Cir. 2007); *Corus Group PLC v. Int’l Trade Comm.*, 352 F.3d 1351, 1357-59 (Fed. Cir. 2003); *Viraj Group, Ltd. v. United States*, 343 F.3d 1371, 1375 (Fed. Cir. 2003).

<sup>148</sup> See *Novosteel*, 284 F.3d at 1273-74; *Hannon*, 234 F.3d at 680 (citing *Becton Dickinson*, 922 F.2d at 800); *Amoco Oil*, 234 F.3d at 1377 (citing *Carbino*, 168 F.3d at 34-35); *Ford Motor Co.*, 463 F.3d at 1276-77 (citing *Novosteel*, 284 F.3d at 1274); *Gilda Indus., Inc. v. United States*, 446 F.3d 1271, 1280 (Fed. Cir. 2006) (citing *Duty Free Int’l, Inc. v. United States*, 88 F.3d 1046, 1048 (Fed. Cir. 1996)). Part and parcel to this rule, a trade plaintiff must raise all issues before the Court prior to remand to Commerce, in order to retain the ability to argue them before the Court post-remand. See *Ad Hoc Comm.*, 1996 U.S. App. LEXIS 19074, at \*4-6.

<sup>149</sup> See *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (citing *Anderson v. City of Boston*, 375 F.3d 71, 91 (1st Cir. 2004); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996); *Laborers’ Int’l Union of N. Am. v. Foster Wheeler Corp.*, 26 F.3d 375, 398 (3d Cir. 1994); *Dunkel*, 927 F.2d at 956)). Arguments merely made in footnotes are also deemed “waived.” *Id.* (citing *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1320-21 n.3 (Fed. Cir. 2005); *Fuji Photo Film Co. v. Jazz Photo Corp.*, 394 F.3d 1368, 1375 n.4 (Fed. Cir. 2005); *Graphic Controls Corp. v. Utah Med. Prods.*, 149 F.3d 1382, 1385 (Fed. Cir. 1998)).

<sup>150</sup> See *Corus Staal*, 502 F.3d at 1378 n.4; *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997).

The Federal Circuit has emphasized that these rules exist to prevent unfairness to the adverse party who would have not notice of the issue,<sup>151</sup> or to the court<sup>152</sup> which would risk issuing an ill-advised opinion without the benefit of the parties'<sup>153</sup> and the lower court's<sup>154</sup> analysis. Refusing to consider untimely issues enforces rules of procedure<sup>155</sup> and prevents gamesmanship.<sup>156</sup> Moreover, the Federal Circuit has emphasized that it sits as a court of *review*, not a trial court; the rules of waiver and forfeiture preserve that appellate structure.<sup>157</sup>

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<sup>151</sup> *Carbino*, 168 F.3d at 34-35 (the rules prevent “the unfairness to the appellee who does not have an opportunity to respond and the added burden on the court that a contrary practice would entail”); *Ford Motor Co.*, 463 F.3d at 1277 (“it is unfair to consider an argument to which the government has been given no opportunity to respond.”). *See also Viskase Corp. v. Am. Nat’l Can Co.*, 261 F.3d 1316, 1326 (Fed. Cir. 2001).

<sup>152</sup> *Id.* at 35 (considering new issues “would be unfair to the court itself, which without the benefit of a response from appellee to an appellant's late-blooming argument, would run the risk of an improvident or ill-advised opinion, given [the court’s] dependence . . . on the adversarial process for sharpening the issues for decision.”) (quoting *Headrick v. Rockwell Int’l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994)).

<sup>153</sup> *Id.*

<sup>154</sup> *Israel Bioeng’g*, 475 F.3d at 1265 (the rules of waiver and forfeiture “permit[ ] the trial judge most familiar with the complex record to address the issue first.”); *Cronin v. United States*, 363 F. App’x 29, 33 (Fed. Cir. 2010) (refusing to address *sua sponte* issue “without the benefit of the trial court's reasoned opinion on the matter.”).

<sup>155</sup> *Novosteel*, 284 F.3d at 1274 (“the non-moving party ordinarily has no right to respond to the reply brief, at least not until oral argument. As a matter of litigation fairness and procedure, then, we must treat this argument as waived.”).

<sup>156</sup> *Smith*, 34 F. App’x at 725 (the rules “avoid encouraging appellants to change the grounds of appeal as they move up the judicial ladder”); *Novosteel*, 284 F.3d at 1274 (“[r]aising the issue for the first time in a reply brief does not suffice; reply briefs reply to arguments made in the response brief -- they do not provide the moving party with a new opportunity to present yet another issue for the court's consideration.”). *See also L.E.A. Dynatech*, 49 F.3d at 1532.

<sup>157</sup> *Sage Prods.*, 126 F.3d at 1426. (“The arguments show a misunderstanding of the role of this court. This is an appellate court. By and large, it is our place to review judicial decisions – including claim interpretations and grants of summary judgment -- reached by trial courts. No matter how independent an appellate court's review of an issue may be, it is still no more than that – a review. With a few notable

The Federal Circuit has also explained, in-depth, its analysis of exceptions to these rules, particularly in *Forshey* and *L.E.A. Dynatech*. The court has followed the Eleventh Circuit in *Dean Witter*, which provides the following specific “exceptions to the general rule”:

- (i) the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice;
- (ii) the proper resolution is beyond any doubt; (iii) the appellant had no opportunity to raise the objection at the district court level; (iv) the issue presents ‘significant questions of general impact or of great public concern[;]’ or (v) the interest of substantial justice is at stake.<sup>158</sup>

The Federal Circuit has also noted that exceptions include the adoption of new legislation altering substance or procedure<sup>159</sup> or a change in case law,<sup>160</sup> the court’s obligation to apply the correct law,<sup>161</sup> when a party appears *pro se*,<sup>162</sup> the existence of a “serious issue of public policy,”<sup>163</sup> when the record is complete,<sup>164</sup> when there

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exceptions, such as some jurisdictional matters, appellate courts do not consider a party’s new theories, lodged first on appeal. If a litigant seeks to show error in a trial court’s overlooking an argument, it must first present that argument to the trial court. In short, this court does not ‘review’ that which was not presented to the district court.”).

<sup>158</sup> *L.E.A. Dynatech*, 49 F.3d at 1531 (citing *Dean Witter*, 741 F.2d at 360-61). *Accord Interactive Gift Exp.*, 256 F.3d at 1344-45.

<sup>159</sup> *Forshey*, 284 F.3d at 1355.

<sup>160</sup> *Id.* at 1356. *See also Interactive Gift Exp.*, 256 F.3d at 1345 (quoting 19 Moore *et al.*, § 205.05, at 205-58).

<sup>161</sup> *Forshey*, 284 F.3d at 1356-37.

<sup>162</sup> *Id.* at 1357-58.

<sup>163</sup> *Interactive Gift Exp.*, 256 F.3d at 1345 (quoting 19 Moore *et al.*, § 205.05, at 205-58). The court has, on one occasion, reached a new issue because it implicated an issue of public policy. *See Fomby-Denson*, 247 F.3d at 1373. Here, the court refused to construe a settlement agreement to “bar the Army from referring [petitioner] to the German authorities” as that construction was contrary to public policy. *Id.*

<sup>164</sup> *Interactive Gift Exp.*, 256 F.3d at 1345 (quoting 19 Moore *et al.*, § 205.05, at 205-58).

would be no prejudice to any party,<sup>165</sup> when no purpose would be served by remand to the trial court,<sup>166</sup> or “where circumstances indicate that it would result in basically unfair procedure.”<sup>167</sup> Nonetheless, the Federal Circuit has emphasized that exceptions to the rule are few<sup>168</sup> and that the discretion to consider new issues should be exercised sparingly.<sup>169</sup>

But, in practice, it is difficult to predict the Federal Circuit’s behavior. The Federal Circuit often provides rather cursory discussion of determination whether or not to entertain untimely issues.<sup>170</sup> This is particularly problematic when cases are treated inconsistently without explanation.

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<sup>165</sup> *Id.* See also *Pfizer*, 518 F.3d at 1359 n.5.

<sup>166</sup> *Interactive Gift Exp.*, 256 F.3d at 1345 (quoting 19 Moore *et al.*, § 205.05, at 205-58).

<sup>167</sup> *Becton Dickison*, 922 F.2d at 800.

<sup>168</sup> *Smith*, 34 F. App’x at 725; *Forshey*, 284 F.3d at 1354 (quoting *Sage Prods.*, 126 F.3d at 1426); *Novosteel*, 284 F.3d at 1273-74 (quoting *Viskase Corp.*, 261 F.3d at 1326).

<sup>169</sup> *Smith*, 34 F. App’x at 725; *Forshey*, 284 F.3d at 1358.

<sup>170</sup> See, e.g., *Hannon*, 234 F.3d at 680 (rejecting issue raised for the first time in the reply brief); *Amoco Oil*, 234 F.3d at 1377 (same); *Novosteel*, 284 F.3d at 1273-74 (refusing to entertain an issue raised for the first time in CIT reply brief); *Ford Motor Co.*, 463 F.3d at 2376-77 (dismissing an issue raised in a single three-sentence footnote in the reply brief), 1278 (simply stating that “[i]f [an argument] was not raised at trial, it is waived” and ignoring the new argument); *Fuji Photo Film Co.*, 394 F.3d at 1375 n.4 (refusing to reach an issue because it was merely mentioned in a footnote in response brief and only addressed fully in the reply brief), 1377 (rejecting an argument when the trial court did not discuss it which “strongly suggest[ed] that Jazz did not bring this issue to the trial court’s attention in a manner that requested or required analysis”); *SmithKline Beecham Corp.*, 439 F.3d at 1320 (summarily dismissing unpreserved argument because it saw “no reason to exercise its [*Becton Dickinson*] discretion”); *Pfizer*, 518 F.3d at 1359 (summarily determining that the new argument involves a predicate legal issue and simply finding “no basis for the claim” that Pfizer was prejudiced); *Ad Hoc Comm.*, 1996 U.S. App. LEXIS 19074, at \*5-6 (refusing to consider new issues because not raised before CIT prior to remand to Commerce); *AK Steel*, 1999 U.S. App. LEXIS 15023, at \*12 (failing to address issue when merely mentioned in a brief’s footnote); *CEMEX*, 133 F.3d at 902 (reaching a new issue because it involves an issue of statutory construction); *Corus Staal*, 502 F.3d at 1378 n.4 (dismissing a new argument because not raised before CIT); *Volkswagen of Am., Inc. v. United States*, 540 F.3d 1324, 1336 (Fed. Cir. 2008) (same; in this case, Volkswagen made its argument only

For example, the Federal Circuit in *CEMEX* addressed an argument, raised for the first time on appeal, as to the way Commerce should interpret 19 U.S.C. §§ 1677(16) and 1677b(a)(1) (1988). In doing so, the Federal Circuit recognized that generally it will not hear new issues, but stated in a conclusory manner that, because appellant had raised “an issue of statutory interpretation,” the court would reach the issue nonetheless.<sup>171</sup> Similarly, in customs classification cases, the court will entertain new arguments when they involve wording contained within the same subheading of the Harmonized Tariff Schedule of the United States.<sup>172</sup> But the Federal Circuit in *Forshey* declined to reach untimely-raised issues involving statutory interpretation.<sup>173</sup>

The Federal Circuit acts inconsistently in its treatment of new constitutional issues. In *Amoco Oil*, the court refused to consider constitutional challenges to the Harbor Maintenance Tax because they were not raised in Amoco’s opening brief.<sup>174</sup> In the same vein, the court refused in *Smith* to entertain the appellant’s constitutional due process arguments because he did not raise them before the Court of Appeals for Veterans Claims and “[c]onstitutional issues in particular call forth a quality and depth of consideration not necessarily present in more ordinary appeals.”<sup>175</sup> However, in *Ninestar*, the court entertained an untimely-raised

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rehearing before the CIT); *Gilda Indus.*, 446 F.3d at 1280 (stating that because the government did not raise a certain argument in its brief, that the government “waived” that argument) (citing *Duty Free Int’l, Inc. v. United States*, 88 F.3d 1046, 1048 (Fed. Cir. 1996) (same)); *JTEKT Corp. v. United States*, 642 F.3d 1378, 1384 (Fed. Cir. 2011); *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1172 (Fed. Cir. 2006) (reaching new issue not raised before CIT and only raised in appellate reply brief because the argument “relates to additional wording within the same subheading under which Processed previously argued classification of its merchandised and in the interest of ascertaining that the goods have been correctly classified” (citation omitted)); *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002) (entertaining new argument because the new argument referred to a part of the same subheading of the Harmonized Tariff Schedule of the United States as that involved in an argument timely raised); *Ninestar*, 667 F.3d at 1382 (exercising discretion to reach new constitutional issue because “significant question[ ] of general impact or great public concern.”).

<sup>171</sup> 133 F.3d at 902.

<sup>172</sup> See *Processed Plastic Co.*, 473 F.3d at 1172; *Rollerblade, Inc.*, 282 F.3d at 1353.

<sup>173</sup> 284 F.3d at 1358-59.

<sup>174</sup> 234 F.3d at 1377.

<sup>175</sup> 34 F. App’x at 725.

constitutional challenge to a penalty assessed by the International Trade Commission (ITC).<sup>176</sup> Moreover, in *Consolidation Coal*, the court addressed appellant’s untimely argument that the Export Clause provided a cause of action under the Tucker Act because the parties and the trial court were “on notice of the issue.”<sup>177</sup> That said, the court also framed the new issue as implicating the trial court’s jurisdiction, which the court could address at any stage of the litigation.<sup>178</sup>

Further, though the Federal Circuit has emphasized the risk of prejudice to adverse parties that may result from allowing consideration of tardily-raised issues,<sup>179</sup> the court, in *Pfizer*, quickly disposed of the adverse party’s allegations of prejudice without further discussion.<sup>180</sup>

In many cases, if the Federal Circuit would like to reach a new issue, it simply cites to the Supreme Court’s decision in *Nelson*, determines that “the lower court [was] fairly put on notice as the substance of the issue,”<sup>181</sup> and goes about its business making a determination on the new issue.<sup>182</sup>

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<sup>176</sup> 667 F.3d at 1382.

<sup>177</sup> 351 F.3d at 1378.

<sup>178</sup> *Id.*

<sup>179</sup> See *Carbino*, 168 F.3d at 34-35; *Ford Motor Co.*, 463 F.3d at 1277; *Viskase Corp.*, 261 F.3d at 1326.

<sup>180</sup> 518 F.3d at 1359 n.5 (“we see not basis for the claim that Pfizer was somehow prejudiced by Teva’s failure to raise this purely legal issue earlier in the proceeding.”).

<sup>181</sup> See, e.g., *Consol. Coal*, 351 F.3d at 1378; *Navajo Nation*, 501 F.3d at 1337; *Norsk Hydro*, 472 F.3d at 1359.

*Nelson* held that the principle that “issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. . . . does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue.” 529 U.S. at 469. *Nelson*, incidentally, resulted from an appeal from the Federal Circuit. In *Nelson*, the Supreme Court, in a unanimous decision, reached the issue of “due process” even though that issue was not clearly raised before the Federal Circuit. *Nelson*’s attorney merely argued at Federal Circuit oral argument that:

[i]t’s legally wrong to subject the individual, nonserved, nonsued, nonlitigated-against person to liability for that judgment. Because there are rules. The rules say if you want a judgment against somebody, you

But sometimes the court completely *ignores* the analysis explained in cases like *Forshey*, *L.E.A. Dynatech*, *Becton Dickinson*, or even *Nelson*. Recently in *Fischer*, the Federal Circuit remanded for Commerce to reconsider its zeroing methodology, even though this issue was not raised before the CIT and mentioned in passing (in one sentence) in two footnotes in the appellate briefs.<sup>183</sup> Inexplicably, the Federal Circuit spent a significant time on zeroing during oral argument,<sup>184</sup> and, subsequently, determined that this was appropriate because the court was already remanding to Commerce on another issue.<sup>185</sup> The court provided no other discussion and did not even mention the factors involved in the exercise of its discretion to reach untimely issues.<sup>186</sup>

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sue them, you litigate against them, you get a judgment against them.

*Id.* at 470 n.4. The Supreme Court determined that “the core of his client’s argument was the fundamental unfairness of imposing judgment [in the trial court] without going through the process of litigation our rules of civil procedure prescribe.” *Id.* at 470. The Court further noted that “[b]oth the majority and the dissent in the Federal Circuit understood that an issue before them concerned the process due after Adams’ postjudgment motion” and the Court’s “[resolution] of the case as a matter of due process therefore rests on a ground considered and passed upon by the court below.” *Id.*

<sup>182</sup> These cases should be compared with *Fuji Photo Film Co.*, when the court rejected a new argument because that argument was not mentioned in the trial court determination which “strongly suggest[ed] that Jazz did not bring this issue to the trial court’s attention in a manner that requested or required analysis.” 394 F.3d at 1377.

<sup>183</sup> *Fischer S.A. v. United States*, 471 F. App’x 892, 896 (Fed. Cir. 2012). The briefs stated that there “would have [been] no dumping margins . . . if [Commerce] had not applied its arbitrary zeroing methodology.” *Id.* (citations omitted).

<sup>184</sup> Oral Argument at 3:01-3:07, 17:58-21:25 (available at <http://www.cafc.uscourts.gov/oral-argument-recordings/2011-1152/all>).

<sup>185</sup> *Fischer*, 471 F. App’x at 896.

<sup>186</sup> See also *In re Comiskey*, 554 F.3d 967, 973-75 (Fed. Cir. 2009) (raising, *sua sponte*, a new ground for affirmance of United States Patent and Trademark Office, Board of Patent Appeals and Interferences, without doing waiver/forfeiture analysis and over vigorous dissent by Judges Moore, Newman, and Rader in *In re Comiskey*, No. 2006-1286, 2009 U.S. App. LEXIS 400 (Fed. Cir. Jan. 13, 2009)).

*Fischer* is difficult to reconcile with cases like *Fuji Photo Film Co.*, in which the court rejected an argument “raise[d] . . . in a footnote in [the] opposition brief and more fully in [the] reply brief.”<sup>187</sup> Moreover, *Ford Motor Co.*, the Federal Circuit refused to hear a new argument raised for the first time “in cursory fashion” in a “single three-sentence footnote” located in the reply brief.<sup>188</sup>

Presumably, the court in *Fischer* addressed zeroing given the importance and uncertainty of the issue in light of court’s decisions in *Dongbu*<sup>189</sup> and *JTEKT*<sup>190</sup> which changed the landscape of the analysis of the reasonableness of Commerce’s use of zeroing in administrative reviews.<sup>191</sup> But, given the lack of reasoning in *Fischer*, litigants are left scratching their heads; what happened to the court’s analysis enumerated in *Forshey* or the stringent rules provided in cases like *Novosteel*? Does the Federal Circuit act haphazardly, reaching a new issue for the simple reason that they think a case is really important or if the judges really want to reach a particular result?

### III. Practice Before the Court of International Trade<sup>192</sup>

The CIT also exercises its discretion without much discussion.<sup>193</sup> However, the court appears, at least on paper, to require more of litigants than the Federal

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<sup>187</sup> 394 F.3d at 1375 n.4.

<sup>188</sup> 463 F.3d at 1277.

<sup>189</sup> *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011).

<sup>190</sup> 642 F.3d 1378.

<sup>191</sup> *JTEKT* itself reached the zeroing issue, though arguably untimely raised, ultimately due to the recent issuance of *Dongbu* after briefing had completed. 642 F.3d at 1384. In comparison, the *Fischer* opening brief was filed *after* the *Dongbu* decision came down.

<sup>192</sup> Similar to the discussion of Federal Circuit behavior, this analysis of cases in the CIT is limited rulings made in writing on the record, and does not attempt to make overarching conclusions about court behavior at oral argument or other similar circumstances.

<sup>193</sup> See, e.g., *Bond Street, Ltd. v. United States*, 774 F. Supp. 2d 1251, 1265 n.13 (Ct. Int’l Trade 2011) (quickly dismissing new argument because not mentioned in opening brief, though going to the merits out of caution); *CEMEX, S.A. v. United States*, 19 Ct. Int’l Trade 587, 594 (1995) (summarily rejecting argument because affirmative defense not plead); *Home Prods. Int’l, Inc. v. United States*, 837 F. Supp. 2d 1294, 1299, 1299-1300 (Ct. Int’l Trade 2012) (*Home Prods II*) (ignoring claim because not plead in complaint); *Nucor Corp. v. United States*, 594 F. Supp. 2d 1320,

Circuit. In general, the CIT is not disposed to consider arguments not briefed by the parties.<sup>194</sup> Often the court has little patience even with insufficiently-briefed arguments, and invokes *Zannino*<sup>195</sup> to reject such arguments *sua sponte*.<sup>196</sup> Some judges, prior to the filing of USCIT Rule 56.2 motions, order the parties to provide the court with preliminary outlines of their arguments, or offer specific instructions to parties as to expectations of arguments contained within the briefs.<sup>197</sup>

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1374 n.36 (Ct. Int'l Trade 2008) (dismissing new argument because not mentioned in opening brief); *Polly U.S.A., Inc. v. United States*, 637 F. Supp. 2d 1226, 1228 n.1 (Ct. Int'l Trade 2009) (rejecting argument in summary fashion because not briefed); *Qingdao Taifa Group Co. v. United States*, 637 F. Supp. 2d 1231, 1244 n.10 (Ct. Int'l Trade 2009) (same); *Firoze A. Fakhri D.B.A. Int'l Trading Co. v. United States*, 507 F. Supp. 2d 1305, 1320 (Ct. Int'l Trade 2007) (reaching issue of unclean hands because the doctrine of unclean hands serves "to protect the integrity of the court").

<sup>194</sup> See, e.g., *Bond Street*, 774 F. Supp. 2d at 1265 n.13; *CEMEX, S.A.*, 19 Ct. Int'l Trade at 594; *Home Prods. II*, 837 F. Supp. 2d at 1299, 1299-1300; *Nucor Corp.*, 594 F. Supp. 2d at 1374 n.36; *KYD, Inc. v. United States*, 836 F. Supp. 2d 1410, 1414 (Ct. Int'l Trade 2012); *Lifestyle Enter., Inc. v. United States*, No. 09-00378, 2012 Ct. Int'l Trade LEXIS 118, at \*19-23 (Ct. Int'l Trade Sept. 7, 2012); *Polly U.S.A.*, 637 F. Supp. 2d at 1228 n.1; *Qingdao Taifa*, 637 F. Supp. 2d at 1244 n.10.

<sup>195</sup> 895 F.2d at 17 ("issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. . . . Judges are not expected to be mindreaders. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace.") (citations and quotation marks omitted).

<sup>196</sup> See, e.g., *Fujian Lianfu Forestry Co. v. United States*, 638 F. Supp. 2d 1325, 1349-50 (Ct. Int'l Trade 2009); *Home Prods. Int'l, Inc. v. United States*, 810 F. Supp. 2d 1373, 1378-79 (Ct. Int'l Trade 2012) (*Home Prods. I*); *Home Prods. II*, 837 F. Supp. 2d at 1300-02; *Presitex USA, Inc. v. United States*, 674 F. Supp. 2d 1371, 1379 n.10 (Ct. Int'l Trade 2010); *Sidenor Indus. SL v. United States*, 664 F. Supp. 2d 1349, 1358 n.4 (Ct. Int'l Trade 2009). See also *MTZ Polyfilms, Ltd. v. United States*, 659 F. Supp. 2d 1303, 1308-09 (Ct. Int'l Trade 2009) (rejecting argument but addressing it anyway to show it has no merit).

<sup>197</sup> But it has also been the case that the court actually will, *sua sponte*, frame the issues for the parties, for example, in litigation challenging dumping determinations as to shrimp imports. See *Amanda Foods (Vietnam) Ltd. v. United States*, Consol. Ct. No. 09-00431 (Ct. Int'l Trade Feb. 9, 2010) (order severing and consolidating cases, providing issues for briefing in each set of cases, and setting briefing schedule).

However, there are exceptions. Predictably, the court will raise issues of jurisdiction<sup>198</sup> or quasi-jurisdiction<sup>199</sup> on its own.

In addition, the court, in a few occasions, has issued procedural orders without request from parties and without acknowledging the irregularity in doing so. It has *sua sponte* vacated prior orders, presumably pursuant to USCIT R. 60(b)<sup>200</sup> though not always explicitly referenced as such.<sup>201</sup> The court has stayed cases *sua*

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<sup>198</sup> See, e.g., *Baroque Timber Indus. (Zhongshan) Co. v. United States*, Consol. Ct. No. 12-00007, 2012 Ct. Intl. Trade LEXIS 121, \*7-8 n.6 (Ct. Int'l Trade Sept. 19, 2012); *Furniture Brands Int'l v. United States*, 807 F. Supp. 2d 1301, 1307 (Ct. Int'l Trade 2011).

<sup>199</sup> See, e.g., *Ad Hoc Shrimp Trade Action Comm. v. United States*, 473 F. Supp. 2d 1336, (Ct. Int'l Trade, 2007) (dismissing argument *sua sponte* because the court determined it had no power to reach the issue), *rev'd*, 515 F.3d 1372 (Fed. Cir. 2008); *Thai Plastic Bags Indus. Co. v. United States*, 752 F. Supp. 2d 1316, 1326 n.26 (Ct. Int'l Trade 2010) (addressing issue of judicial estoppel *sua sponte*).

<sup>200</sup> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial or rehearing under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

<sup>201</sup> See, e.g., *MCC Eurochem v. United States*, 780 F. Supp. 2d 1341, 1342 (Ct. Int'l Trade 2011) (vacating prior order dismissing challenge to zeroing in light of *Dongbu* and *JTEKT*); *Tembec, Inc. v. United States*, 475 F. Supp. 2d 1393, 1402 (Ct. Int'l Trade 2007) (vacating prior order pursuant to USCIT R. 60(b) based upon the Softwood Lumber Agreement). See also *JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1363 (Ct. Int'l Trade 2011) (reconsidering a prior order as to parties that moved, as well as parties that did not move, for reconsideration).

*sponte* pending the outcome of appeals<sup>202</sup> and pending the outcome of litigation concerning other administrative proceedings.<sup>203</sup> The court will request briefing on issues missed by the parties.<sup>204</sup> Recently the court has determined, *sua sponte*, that interlocutory appeal to the Federal Circuit “is appropriate,” and crafted specific issues for appeal “upon request [for certification] by the parties.”<sup>205</sup> In *Baroque Timber Industries*, the court dismissed one of the plaintiffs’ complaint for lack of jurisdiction because that plaintiff failed to comply with the timing requirements of 19 U.S.C. § 1516a(a)(2).<sup>206</sup> The court questioned the jurisdictional nature of section 1516a(a)(2) and the applicability of equitable tolling to that provision, and thus suggested that a party seek appeal on these issues before litigation would continue.<sup>207</sup>

There are a few instances in which the court has recognized its discretion to reach untimely or unbriefed merits issues. But there appears to be no consistency as to when the CIT will mention the discretion or indeed when it will exercise it.

In *Home Prods. II*, the plaintiff argued that its failure to timely raise a challenge to Commerce’s rejection of the plaintiff’s case brief was excused by an intervening change in case law.<sup>208</sup> The court determined that *Grobest* did not effect a change in law as to Commerce’s enforcement of its administrative deadlines and, therefore, the plaintiff could not avail itself of this exception to forfeiture.<sup>209</sup>

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<sup>202</sup> See *Apex Exps. v. United States*, No. 11-00291 (Ct. Int’l Trade Aug. 6, 2012) (order *sua sponte* staying case, in which the plaintiffs challenged Commerce’s zeroing practice, pending final disposition in litigation before the Federal Circuit on the zeroing issue in *Union Steel v. United States*, CAFC Court No. 2012-1248).

<sup>203</sup> See *Home Prods. Int’l, Inc. v. United States*, No. 08-00094 (Ct. Int’l Trade Dec. 15, 2011) (order *sua sponte* staying challenge to second administrative review pending final disposition in litigation involving the third administrative review of the same products before another CIT judge).

<sup>204</sup> See *Papierfabrik August Koehler AG v. United States*, No. 11-00147 (Ct. Int’l Trade Oct. 18, 2012) (order issued during oral argument *sua sponte* requiring the parties to brief the issue of the propriety of issuing a stay pending *Union Steel*).

<sup>205</sup> See, e.g., *Baroque Timber Indus.*, 2012 Ct. Intl. Trade LEXIS 121, at \*25-27.

<sup>206</sup> *Id.* at \*20.

<sup>207</sup> *Id.* at \*25-27.

<sup>208</sup> 837 F. Supp. 2d at 1299-1300 (citing *Grobest & I-Mei Indus. v. United States*, 815 F. Supp. 2d 1342, 1364 (Ct. Int’l Trade 2012)).

<sup>209</sup> *Id.*

In a more perfunctory manner, the court, in *Firoze A. Fakhri*, raised, *sua sponte*, the issue of unclean hands in its analysis of the propriety of an award of attorney fees pursuant to the Equal Access to Justice Act.<sup>210</sup> According to the court, “[t]he defense [of unclean hands] need not be raised by a party as the court can invoke it *sua sponte*” because “[t]he doctrine is invoked to protect the integrity of the court.”<sup>211</sup>

In addition, the court in *KYD* rejected a “waived” 8th Amendment constitutional challenge to Commerce’s adverse facts available dumping rate, because the challenge was not an issue that involved “significant questions of general impact or of great public concern[.]”<sup>212</sup> Of note, the court made this determination in light of its subsequent holding – despite its finding that the issue was untimely raised – that the constitutional challenge had no merit.<sup>213</sup>

The treatment of the constitutional issue in *KYD* reflects a misunderstanding of the analytical framework. According to Federal Circuit practice, the court determines whether an issue is “important” before reaching the merits of the issue. The Federal Circuit separates the analysis, first looking to the importance of the issue and/or the propriety of reaching the constitutional issue, and only *then* reaches the merits.<sup>214</sup> If the analysis were – as applied in *KYD* – that an issue is not “important” because the issue has no merit, then the “waived” issue will almost always be reached by the court. That is, in order to determine whether an issue should be covered by the “important issue” exception to the “general rule” against reaching new issues, the court reaches the new issue; the exception swallows the rule.

A more comprehensive discussion can be found in *Chr. Bjelland Seafoods*, decided in 1992.<sup>215</sup> There, the court, in reviewing an ITC material injury determination for substantial evidence, reached the legal issue of whether “lingering

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<sup>210</sup> 507 F. Supp. 2d at 1320.

<sup>211</sup> *Id.*

<sup>212</sup> 836 F. Supp. 2d at 1414.

<sup>213</sup> *Id.* at 1414-15.

<sup>214</sup> See *Ninestar*, 667 F.3d at 1382-85 (determining that a constitutional challenge to the ITC’s assessment of a penalty because the challenge involved “significant questions of general impact or of great public concern”; the court then held that no constitutional violation existed).

<sup>215</sup> *Chr. Bjelland Seafoods A/S (Now Norwegian Salmon A/S) v. United States*, 16 Ct. Int’l Trade 1043 (1992).

effects could satisfy the present injury requirement.”<sup>216</sup> The defendant-intervenors argued that the plaintiffs had not timely raised this issue; the court disagreed, reading the complaint broadly to encompass that issue.<sup>217</sup> Yet, the court held, in the alternative, that even if the plaintiffs had not made the argument, that it could address the “lingering effects” issue because the issue was “fundamental” to substantial evidence review and that the issue was an “inherent, underlying legal issue” such that “the issue was manifestly raised before it.”<sup>218</sup> In other words, consistent with *Kamen, National Bank of Oregon*, and other cases, the “lingering effects” question was a predicate legal issue necessary for the resolution of the case.

Curiously, the court went further to determine that the “lingering effects” question implicated interests of public policy,<sup>219</sup> in particular, that “in sound and reasoned judicial decisionmaking.”<sup>220</sup> The “public interest” issue applied in this case is overwhelmingly broad, as, arguably, reaching any relevant meritorious issue would contribute to “sound and reasoned judicial decisionmaking.”

Another interesting decision from the CIT is *Atar*.<sup>221</sup> In that case, the court reached the issue of Commerce’s alleged application of a minimum profit cap requirement contrary to *Florida Trade Counsel*,<sup>222</sup> despite the fact that the plaintiff failed to make the argument.<sup>223</sup> The court openly admitted that it could ignore the

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<sup>216</sup> *Id.* at 1044 (citation omitted).

<sup>217</sup> *Id.* at 1044-45 & n.1.

<sup>218</sup> *Id.* at 1045.

<sup>219</sup> *Id.* at 1046 (citing *Nuelson v. Sorensen*, 293 F.2d 454 (9th Cir. 1961); *Cont’l Ins. Cos.*, 842 F.2d at 984 (“we can consider issues not raised in the briefs or in oral argument, particularly when substantial public interests are involved.” (citing *Consumers Union v. Fed. Power Comm’n*, 510 F.2d 656, 662 & nn.9-10 (D.C. Cir. 1974))); *United States v. Hoyt*, 879 F.2d 505 (9th Cir. 1989), *modified*, 888 F.2d 1257 (9th Cir. 1989) (“court of appeals may review issues *sua sponte* under exceptional circumstances, where substantial public interests are involved, or where to not do so would be unduly harsh to one or both of the parties.”)). *Chr. Belland Seafoods* is the only case the author has found in which the CIT applies the “public interest” exception.

<sup>220</sup> *Id.* at 1046.

<sup>221</sup> *Atar, S.r.L. v. United States*, 703 F. Supp. 2d 1359 (Ct. Int’l Trade 2010).

<sup>222</sup> *Fla. Trade Council v. United States*, 41 F. Supp. 2d 319, 330-32 (Ct. Int’l Trade 1999).

<sup>223</sup> *Atar*, 703 F. Supp. 2d at 1365-66.

issue “on a waiver theory,” but determined to analyze the issue in its discretion<sup>224</sup> because the plaintiff “impliedly” relied on the reasoning in *Florida Trade Counsel*<sup>225</sup> and the court felt compelled to consider the profit cap requirement given the issue’s “full implications.”<sup>226</sup> In addition, the court determined that consideration of Commerce’s compliance with *Florida Trade Counsel* was “antecedent” and “ultimately dispositive” of the legal issue at hand, citing to *National Bank of Oregon*,<sup>227</sup> *Arcadia*,<sup>228</sup> and *Kamen*.<sup>229</sup> <sup>230</sup> The court proceeded to remand the case to Commerce on the issue of the profit cap requirement.<sup>231</sup>

Ultimately, the court does not regularly provide much insight into the considerations that guide the court when addressing or rejecting untimely arguments. Perhaps members of the court forget or ignore their discretion to look beyond the parties’ briefs? Or, perhaps, judges see the waiver/forfeiture rules as streamlining litigation, conserving resources of the court, and assisting in maintaining high standards for members of the trade bar?

#### IV. Why the Courts Should Enforce the “General Rule”

These realities aside, it is problematic when the courts do the parties’ jobs for them, even in trade cases. There are good reasons for confining judicial consideration to timely-raised issues.

As a general matter, the American system of justice is predicated upon an adversarial model, not an inquisitorial one, which relies on the parties to present issues to the court.<sup>232</sup> In many cases, the parties are in the best position to develop

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<sup>224</sup> *Id.* at 1365.

<sup>225</sup> *Id.* at 1365-66.

<sup>226</sup> *Id.* at 1366.

<sup>227</sup> 508 U.S. at 447.

<sup>228</sup> 498 U.S. at 447.

<sup>229</sup> 500 U.S. at 99.

<sup>230</sup> *Atar*, 703 F. Supp. 2d at 1366.

<sup>231</sup> *Id.* at 1366-67.

<sup>232</sup> See *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008); *Headrick*, 24 F.3d at 1278. See also *Frost*, *supra* note 1, at 456, 457-58; *Weigand*, *supra* note 1, at 183-84.

arguments, and the courts make better decisions because of that development.<sup>233</sup> Trade cases involve repeat players, challenging investigations and successive administrative reviews on duties imposed on the same goods imported, exported, or produced by the same parties. Often, the same issues come up in those administrative proceedings. Moreover, because there is a proceeding below, lasting several months, the parties have ample notice of which issues will be relevant and have ample time to flesh out arguments or provide reasoning for review before the appeal to the CIT and beyond. The parties have much more experience and expertise with the administrative proceedings on appeal than do the courts. Thus, raising arguments should be the responsibility of the *parties*, not the judge.<sup>234</sup>

We do, and should, have high expectations of those government and private attorneys in the trade bar.<sup>235</sup> Expecting the court to develop the parties' arguments diminishes counsel responsibility and reduces competition.<sup>236 237</sup> The trade bar itself is comprised by and large of attorneys who specialize in trade litigation, and

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<sup>233</sup> See *Greenlaw*, 544 U.S. at 243-44. See also *Carducci*, 714 F.2d at 177; Frost, *supra* note 1, at 461.

<sup>234</sup> See *Weigand*, *supra* note 1, at 183; *Martineau*, *supra* note 1, at 1029-31; *Cravens*, *supra* note 1, at 272, 296.

<sup>235</sup> See *Miller*, *supra* note 1, at 1270.

<sup>236</sup> In any event, ethically-speaking, attorneys before either court are expected to provide vigorous representation. The Model Rules of Professional Conduct impose stringent requirements on attorneys to represent their clients with competence and diligence. Rule 1.1 states that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.1 (2012). Rule 1.3 requires that attorneys “act with reasonable diligence and promptness in representing a client.” *Id.* R. 1.3. Of course, the Rules of the Court of International Trade allow for the imposition of sanctions against attorneys and parties if the legal arguments are frivolous or not supported by existing law, USCIT R. 11(b)(2), and the Model Rules instruct attorneys to avoid making frivolous arguments. MODEL RULES OF PROF’L CONDUCT R. 3.1 (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

<sup>237</sup> Further, the court, as an impartial arbiter, should not reward tactical decisions made by parties not to raise issues in a timely manner. See *Weigand*, *supra* note 1, at 184, 270-73; *Steinman*, *supra* note 1, at 1566; *Martineau*, *supra* note 1, at 1030, 1031.

who have singular knowledge of the issues in play given that they see the cases through both administrative and judicial proceedings.<sup>238</sup>

Admittedly, ours is also a flexible<sup>239</sup> system of justice in which, at the trial court level, amendments to pleadings are liberally allowed.<sup>240</sup> But limiting consideration to timely-raised issues comports with notions of fundamental fairness<sup>241</sup> and avoids prejudice to the adverse party<sup>242</sup> because the latter party is given sufficient notice of the issue and an opportunity to be heard consistent with principles of due process.<sup>243</sup> The adverse party additionally is not ambushed by new issues and has time to adequately develop its arguments.<sup>244</sup> In the context of trade cases, a private party's opportunity to respond to Commerce's arguments should be consistent with that required during administrative proceedings. And notice also allows Commerce to prepare and provide that reasoning or explanation in briefing or to take voluntary remands where appropriate.<sup>245</sup>

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<sup>238</sup> This is not to say that judges are not also excellent lawyers. They are often the best and most experienced lawyers in the courtroom. *See Frost, supra* note 1, at 507. But their experience with and attention to each individual case pales in comparison to that normally possessed by the parties' advocates.

<sup>239</sup> *See Hormel*, 312 U.S. at 556.

<sup>240</sup> *See Miller, supra* note 1, at 1271 (discussing Fed. R. Civ. P. 15(b); Fed. R. Civ. P. 54(c)).

<sup>241</sup> *See Hormel*, 312 U.S. at 556; *Carbino*, 168 F.3d at 35; *Weigand, supra* note 1, at 184, 186; *Miller, supra* note 1, at 1267; *Martineau, supra* note 1, at 1031; *Rooklidge and Weil, supra* note 1, at 735; *Cravens, supra* note 1, at 269, 280.

<sup>242</sup> *See Hormel*, 312 U.S. at 556.

<sup>243</sup> *See Carbino*, 168 F.3d at 34-35; *Frost, supra* note 1, at 460; *Weigand, supra* note 1, at 185-86, 250-51; *Miller, supra* note 1, at 1260, 1288-92, 1294. *See also Hannon v. Dep't of Justice*, 234 F.3d 674, 680 (Fed. Cir. 2000).

<sup>244</sup> *See Hormel*, 312 U.S. at 556; *Weigand, supra* note 1, at 184-86; *Steinman, supra* note 1, at 1566, 1603; *Martineau, supra* note 1, at 1039; *Cravens, supra* note 1, at 272.

That said, courts sometimes mitigate this problem by requesting supplemental briefing, *see Miller, supra* note 1, at 1297-1300, or, if on appeal, remanding the issue to the lower court instead of deciding it in the first instance. *See Miller, supra* note 1, at 1300-01, 1305; *Steinman, supra* note 1, at 1534-35; *Cravens, supra* note 1, at 267-68.

<sup>245</sup> This can be particularly acute when the first opportunity given to Commerce to address an issue is through government or private counsel at oral

Moreover, the structure and integrity of our court system – including the roles and competencies afforded the CIT and the Federal Circuit – benefit from encouraging parties to make arguments at the earliest possible time.<sup>246</sup> The Federal Circuit, as an appellate court, sits to review underlying trial court determinations,<sup>247</sup> not to make its own findings of fact<sup>248</sup> or to transform every appeal into a *de novo* proceeding.<sup>249</sup> The role of CIT is to address legal issues in the first instance for appellate court review.<sup>250</sup> Allowing the CIT to entertain the issue first provides the appellate court the benefit of the CIT decision<sup>251</sup> and maintains the CIT’s legitimacy.<sup>252</sup>

The “general rule” also increases the finality of judicial decision-making,<sup>253</sup> and conserves judicial resources. The courts, in particular the Federal Circuit, do not have the resources to act as advocates for the parties.<sup>254</sup> Additionally,

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argument who possess no authority to provide the court with *post hoc* defenses of Commerce determinations.

<sup>246</sup> See Weigand, *supra* note 1, at 180-81, 251; Steinman, *supra* note 1, at 1565 (quoting *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709, 714 (10th Cir. 2010) (quoting *Cummings v. Norton*, 393 F.3d 1186, 1190 (10th Cir. 2005)); *Air Fla.*, 750 F.2d at 1085 (quoting *Johnston v. Reily*, 160 F.2d 249, 250 (D.C. Cir. 1960)).

<sup>247</sup> See *Sage Prods.*, 126 F.3d at 1426; Weigand, *supra* note 1, at 245; Steinman, *supra* note 1, at 1522.

<sup>248</sup> See Frost, *supra* note 1, at 476; Steinman, *supra* note 1, at 1538, 1604. Unfortunately, the Federal Circuit has been known to make fact findings particularly in the context of patent litigation. See generally Rooklidge and Weil, *supra* note 1.

<sup>249</sup> See Martineau, *supra* note 1, at 1034.

<sup>250</sup> Steinman, *supra* note 1, at 1603; Martineau, *supra* note 1, at 1040.

<sup>251</sup> See *Air Fla.*, 750 F.2d at 1085; Weigand, *supra* note 1, at 185-86, 266; Steinman, *supra* note 1, at 1523.

<sup>252</sup> See Weigand, *supra* note 1, at 245; Miller, *supra* note 1, at 1267; Rooklidge and Weil, *supra* note 1, at 739.

<sup>253</sup> Frost, *supra* note 1, at 461, 476; Weigand, *supra* note 1, at 183, 184.

<sup>254</sup> Frost, *supra* note 1, at 461; Cravens, *supra* note 1, at 272-73, 280. But perhaps the cynic would argue that the CIT itself, given its lighter case load, has adequate resources and expertise to play advocate.

consistent with USCIT Rule 1,<sup>255</sup> which reflects the need for streamlined trade litigation to minimize trade disruption, the “general rule” maximizes judicial efficiency. Appellate proceedings are more efficient<sup>256</sup> because the Federal Circuit has the benefit of the party briefing and court analysis from proceedings below.<sup>257</sup> The court can dispose of the appeal without needing to address new issues<sup>258</sup> and without violating the constitutional avoidance doctrine.<sup>259</sup> Moreover, raising issues before the CIT in the first instance results, at least theoretically, in fewer CIT errors and fewer appeals.<sup>260</sup> <sup>261</sup> CIT proceedings are more efficient<sup>262</sup> because addressing issues at the first possible time avoids needless proceedings pre- or post-appeal.<sup>263</sup>

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<sup>255</sup> USCIT Rule 1 states that the Rules of the Court of International Trade “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

<sup>256</sup> See Steinman, *supra* note 1, at 1567; Martineau, *supra* note 1, at 1024, 1032.

<sup>257</sup> See Smith, 34 F. App’x at 725. See also Rooklidge and Weil, *supra* note 1, at 735-36 (quoting *Seal-Flex, Inc. v. Athletic Track & Court Constr.*, 172 F.3d 836, 852 (Fed. Cir. 1999)(Bryson & Newman, JJ., concurring)).

<sup>258</sup> See Miller, *supra* note 1, at 1267.

<sup>259</sup> See Frost, *supra* note 1, at 456-57, 479; Weigand, *supra* note 1, at 252.

<sup>260</sup> See Steinman, *supra* note 1, at 1603-04.

<sup>261</sup> It could be argued that court consideration of all issues, even those not raised properly before the court, serves the purpose of the antidumping and countervailing duty statutes is to “determin[e] current margins as accurately as possible.” *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). See also *Parkdale Int’l v. United States*, 475 F.3d 1375, 1380 (Fed. Cir. 2007); *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001); *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). But it is not certain that the court’s consideration of new relevant issues, if the court discovers these issues *sua sponte* or is presented with them in an untimely manner, arguably serves to promote “accuracy.” Whether or not *increased* court consideration would necessarily result in *increased* accuracy of dumping or countervailing duty margins could be the subject of a whole new legal article. Suffice it to say that “accuracy” is in the eye of the beholder. Much of what goes into issuing an antidumping or countervailing duty order involves agency policy determinations. Despite judicial confidence that its intervention ensures better margins, Commerce, and not the court, is the “the ‘master’ of antidumping law.” *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985). The courts appropriately defer to Commerce’s “selection and development of proper methodologies.” *Thai Pineapple Pub. Co. v. United States*, 187

The biggest concern I have is that the courts apply their discretion to reach new issues in an *ad hoc* and unpredictable fashion. I am not alone in this criticism.<sup>264</sup> The current exercise of the courts' discretion appears completely unpredictable and results in unequal treatment of parties.<sup>265</sup>

It is hardly surprising that court decisions are inconsistent and appear unfair. The "exceptions" applied by the CIT and the Federal Circuit – when indeed the courts recognize and apply them – are overwhelmingly large in number and, in many cases, so broad or ambiguous as to be almost unworkable. The biggest offenders in this respect are the *Nelson* exception and the exceptions for legal questions that are "important" or affect the "public interest."

Yet even simpler exceptions provide a trade litigant with very little guidance. One particular example is the exception for purely legal questions that require no factual development. The line between legal questions and factual questions is fuzzy,<sup>266</sup> and although the CIT explained the distinction between "legal" issues and

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F.3d 1362, 1365 (Fed. Cir. 1999) (citing *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993); *Fujitsu*, 88 F.3d at 1044). Much of the work in building dumping margins "turn[s] on complex economic and accounting inquiries" of which the courts have little expertise. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996). And sometimes the court simply gets it wrong (that is, according to legislative and executive decisionmakers), requiring both Congress and Commerce to step in. See, e.g., *GPX Int'l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011). Thus, judicial restraint in considering new arguments or developing arguments for the parties could also in some instances increase accuracy, as fewer issues addressed means fewer legal errors and less intrusion into executive decision making. See *Carbino*, 168 F.3d at 35 (quoting *Headrick*, 24 F.3d at 1278); Cravens, *supra* note 1, at 280; Miller, *supra* note 1, at 1266-67.

<sup>262</sup> See Frost, *supra* note 1, at 461.

<sup>263</sup> See Martineau, *supra* note 1, at 1029, 1031; Steinman, *supra* note 1, at 1566; Weigand, *supra* note 1, at 185.

<sup>264</sup> See Martineau, *supra* note 1, at 1033-34, 1054, 1057-58; Weigand, *supra* note 1, at 252; Frost, *supra* note 1, at 463-64. See also *Essinger*, 534 F.3d at 453.

<sup>265</sup> Weigand, *supra* note 1, at 281.

Some have noted that various federal judges themselves are inconsistent in their willingness to entertain new issues, seemingly without reasoned justification. Miller, *supra* note 1, at 1256-60.

<sup>266</sup> See Steinman, *supra* note 1, at 1568-70.

“factual” issues<sup>267</sup> and judicial review of legal and factual issues differs,<sup>268</sup> it is unclear how useful the distinction is for our purposes. Arguably, every issue analyzed by courts in trade cases – or indeed any administrative record review cases – is “legal” in the sense that, in the court, no facts are developed or factual findings made. In trade cases, the applicable facts are already contained within the administrative record and Commerce, as the finder of fact, has already drawn conclusions and made credibility determinations as to the facts.<sup>269</sup> Absent Commerce action on remand, the facts on the record do not change, the court reviews only the sufficiency of that record and the legal conclusions made therefrom.<sup>270</sup> Because the record is already “developed,” this exception could apply in every trade case.

It is not my contention that it is *never* appropriate for the CIT and Federal Circuit to raise arguments *sua sponte* or address untimely-raised issues. I recognize that the court, not the parties, should independently control statements of law<sup>271</sup>

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<sup>267</sup> See, e.g., *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1268 (Ct. Int’l Trade 2006), *aff’d in part and vacated in part other grounds*, 604 F.3d 1363 (Fed. Cir. 2010) (“Whether a data set selection issue is factual or legal, *i.e.*, reviewed for substantial evidence or for its accordancy with law, depends on the question presented. If the question is whether Commerce may use a particular piece of data, whether Commerce may use a factor in weighing the choice between two data sources, or what weight Commerce may attach to such a factor, the question is legal. If the question is whether Commerce should have used a particular piece of data, when viewed among alternative available data, or what weight Commerce should attach to a price or data, the question is factual.” (citations omitted)).

<sup>268</sup> The CIT holds unlawful Commerce antidumping and countervailing duty determinations that are “unsupported by substantial evidence on the record, or otherwise not in accordancy with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). The Federal Circuit reviews CIT decisions *de novo*, and thus applies the same standard of review when faced with appeals from Commerce determinations. *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1377 (Fed. Cir. 2008).

<sup>269</sup> See *Consolo*, 383 U.S. at 620; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962). However, unfortunately, sometimes issues will arise in trade cases that tempt the court to make fact findings. See, e.g., *KYD, Inc. v. United States*, 704 F. Supp. 2d 1323, 1331-32 (Ct. Int’l Trade 2010) (finding that plaintiff satisfied the requirements contained in 19 U.S.C. § 1677m(e)).

<sup>270</sup> As explained by the Federal Circuit in *Essar Steel*, the court may not require Commerce to reopen or supplement the administrative record. See *Essar Steel, Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012).

<sup>271</sup> See *Frost*, *supra* note 1, at 453, 471, 482-85.

and has the responsibility to say “what the law is”<sup>272</sup> and to develop its own philosophies or methods to interpret the law.<sup>273</sup> The court cannot rely on inaccurate or misleading statements of law even if propounded by the parties.<sup>274</sup> The court does not and should not sit as merely an umpire “calling balls and strikes,”<sup>275</sup> but, instead, announces broad guidelines and rules for future cases.<sup>276</sup>

Moreover, there are uncontroversial, discrete situations in which it may make sense for the court to consider untimely arguments. For example, as I noted earlier, a court may analyze its own jurisdiction or quickly dispose of a case on a ground not noticed by the parties,<sup>277</sup> or, by addressing new issues, a court may avoid answering constitutional or other questions to maintain the balance of powers.<sup>278</sup>

I am, however, critical of broad or ambiguous factors or exceptions that result in inconsistent court decision making. Courts have not developed a uniform, consistent test,<sup>279</sup> the Federal Circuit and CIT included. In fact, federal courts nationwide have applied “no less than thirty factors, considerations, or separate singular exceptions to the raise or lose general rule”<sup>280</sup> such that it is “impossible to devise any workable scale or means of measure as to value any one ‘factor’ versus another.”<sup>281</sup> Court behavior thus conflicts with the principle that trade laws should

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<sup>272</sup> See *id.* at 470-71 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). See also *id.* at 453; Weigand, *supra* note 1, at 190-91.

<sup>273</sup> See Frost, *supra* note 1, at 476-78.

<sup>274</sup> See *id.* at 452, 473, 476.

<sup>275</sup> See Miller, *supra* note 1, at 1276-77 (quoting *Smith v. Farley*, 59 F.3d 659, 665 (7th Cir. 1995)). See also *id.* at 1272 (quoting *Carlisle v. United States*, 517 U.S. 416, 437 (1996) (Stevens, J., dissenting)).

<sup>276</sup> See *id.* at 1273-74.

<sup>277</sup> See Cravens, *supra* note 1, at 278.

<sup>278</sup> See Frost, *supra* note 1, at 479-80.

<sup>279</sup> See Weigand, *supra* note 1, at 181, 184-85, 252-53, 290; Miller, *supra* note 1, at 1279, 1286-88; Martineau, *supra* note 1, at 1024, 1033-34, 1057-59; Cravens, *supra* note 1, at 273.

<sup>280</sup> Weigand, *supra* note 1, at 253.

<sup>281</sup> *Id.*

be administered and enforced in a consistent and predictable manner,<sup>282</sup> and, more generally, detracts from the public legitimacy and the parties' acceptance of judicial decisions.<sup>283</sup>

## V. Conclusion

What are the expectations of parties and, by extension, the parties' attorneys in the CIT and Federal Circuit? In other words, when will the courts save the parties from themselves? Unfortunately, as noted in *Essinger*, this is "a question with no certain answer."<sup>284</sup> But we can draw a few conclusions given the previous behavior of the courts.

First, litigants before the CIT should have their ducks in a row. The CIT rejects untimely raised or insufficiently briefed merits issues. While the court has an extensive analysis it conducts in determining whether, pursuant to 28 U.S.C. § 2637(d)<sup>285</sup> to require a party to exhaust administrative remedies,<sup>286</sup> on the record the court tends to summarily dismiss issues not preserved in a party's opening brief.

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<sup>282</sup> *Wheatland Tube Corp. v. United States*, 841 F. Supp. 1222, 1228 & n.11 (Ct. Int'l Trade 1993) (citing David A. Hartquist, Jeffrey S. Beckington and Kathleen W. Cannon, Toward a fuller appreciation of nonacquiescence, collateral estoppel, and *stare decisis* in the U.S. Court of International Trade, 14 Fordham International Law Journal 112-138 (1990); Charles H. Nalls and Paul R. Bardos, *Stare Decisis* and the U.S. Court of International Trade: two case studies of a perennial issue, 14 Fordham International Law Journal 139-185 (1990)).

<sup>283</sup> See Weigand, *supra* note 1, at 245, 248.

<sup>284</sup> 534 F.3d at 453.

<sup>285</sup> "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."

<sup>286</sup> The CIT has recognized limited exceptions to the exhaustion requirement, including: (1) plaintiff raises a pure question of law that does not require further agency involvement; (2) plaintiff did not have timely access to the confidential record; (3) an intervening judicial interpretation has changed the agency result; (4) raising the argument at the administrative level would have caused plaintiff irreparable harm; and (5) raising the argument at the administrative level would have been futile. See *Corus Staal BV v. United States*, 30 Ct. Int'l Trade 1040, 1050 n.11 (2006), *aff'd*, 502 F.3d 1370 (Fed. Cir. 2007); *Asahi Seiko Co. v. United States*, No. 09-00415, Slip Op. 11-24 at 17-19 (Ct. Int'l Trade Mar. 1, 2011). Many of these exceptions are similar to those that apply to waiver and forfeiture, but the court recognizes and analyzes these exceptions far more often than with waiver or forfeiture.

The court rarely conducts or even recognizes the exceptions provided in *L.E.A. Dynatech* and *Forshey*, and is even less disposed to apply one of those exceptions.

This is not to say that the CIT never considers new issues in motions for rehearing. But parties that attempt to challenge CIT refusal to consider late arguments are likely out of luck. CIT dispositions in a motion for rehearing are reviewed on appeal for abuse of discretion,<sup>287</sup> that is, that the CIT's determination is "clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law."<sup>288</sup>

Second, if parties miss the boat before the CIT, despite the deference afforded the CIT's exercise of discretion, the parties nonetheless could prevail by raising new issues before the Federal Circuit in the first instance.<sup>289</sup> More realistically, if the case is already on appeal, the parties can and have had success raising new issues at oral argument or at least in some fashion (even in one sentence!) in the briefs.

At the end of the day, the Federal Circuit and CIT – like most other federal courts – appear to arbitrarily pick and choose when and whom they save from the failure to preserve issues for review. Some scholars contend that the so-called requirement that parties raise arguments before the court devolves into merely a "vehicle[ ] for reversal when the predilections of a [court] are offended"<sup>290</sup> perhaps even guided by judge's political persuasion.<sup>291</sup> Unfortunately, it is difficult for me to disagree with this statement.

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<sup>287</sup> See *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 143 (2d Cir. 1998) (reviewing failure of trial court to grant Rule 59 motion for reconsideration when new arguments raised in motion for "abuse of discretion"); see also *Hohenberg Bros. Co. v. United States*, 301 F.3d 1299, 1303 (Fed. Cir. 2002) (stating that the Federal Circuit reviews CIT denials of motions under USCIT Rules 59 and 60 for "abuse of discretion") (citing *Mass. Bay Transp. Auth. v. United States*, 254 F.3d 1367, 1378 (Fed. Cir. 2001)).

<sup>288</sup> *Hohenberg Bros.*, 301 F.3d at 1303.

<sup>289</sup> That said, parties that choose not to appeal may still benefit from appeals taken by other parties to an action. See, e.g., *Dongbu*, 635 F.3d 1363. In *Dongbu*, *Dongbu* itself did not take an appeal to the Federal Circuit, relying instead upon the appeal taken by Union Steel Manufacturing Co., Ltd.

<sup>290</sup> Weigand, *supra* note 1, at 246; Martineau, *supra* note 1, at 1058. See also Miller, *supra* note 1, at 1256, 1286; Frost, *supra* note 1, at 463-64.

<sup>291</sup> See Miller, *supra* note 1, at 1260-61, 1306-07; Weigand, *supra* note 1, at 282.