When the Courts Save Parties from Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade

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I. INTRODUCTION[1]

Federal courts frequently refuse to consider issues not timely raised by the parties.[2] Courts will not consider arguments that parties have waived or forfeited and will not address issues *sua sponte*.[3] In particular,

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1. *See, e.g.*, Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 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 & 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.

2. 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.

3. 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 n.4 (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." (citation omitted)); Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (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 omitted) (internal quotation marks omitted)).

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.

appellate courts will not consider issues not passed on by the trial court.[4] Courts will not address arguments that are not raised in briefs,[5] not sufficiently fleshed out within the briefs,[6] raised for the first time in reply briefs,[7] raised for the first time at oral argument,[8] or even if a court determines that a party failed to present an argument at the "first possible time."[9]

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.[10] Courts exercise this discretion on a case-by-case basis,[11] when they determine whether it is appropriate to consider new issues "under all the circumstances."[12] And this exercise appears to happen more and more frequently,[13] notably in the United States Court of Appeals for the Federal Circuit.[14]

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4. 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 1264-65.

5. Miller, *supra* note 1, at 1266.

6. *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." (citation omitted)).

7. *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)).

8. *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)).

9. *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)).

10. Singleton v. Wulff, 428 U.S. 106, 121 (1976); *see also* Weigand, *supra* note 1, at 180-81; Steinman, *supra* note 1, at 1563. 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 difference 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.

11. *Singleton*, 428 U.S. at 121; Harris Corp. v. Ericsson Inc., 417 F.3d 1241, 1251 (Fed. Cir. 2005).

12. Forshey v. Principi, 284 F.3d 1335, 1358 (Fed. Cir. 2002).

13. *See* Martineau, *supra* note 1, at 1025.

14. This appears so, at least within the context of patent litigation. *See* Rooklidge & Weil, *supra* note 1, at 729-30, 748-50.

As recognized by Professor Robert Martineau and those who follow, the presumption against consideration of untimely raised issues is not, in many cases, a "general rule" at all.[15]

Although the United States Supreme Court stated in *Singleton v. Wulff* that "the general rule [is] that a federal appellate court does not consider an issue not passed upon below," the Court ultimately claimed to "announce no general rule."[16] 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.'"[17] Courts apply these exceptions 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.[18]

Whether a court will address an untimely raised issue "is a question with no certain answer."[19] This is because courts usually provide little or no reasoning to support their choices to either consider or ignore new issues.[20] 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.[21] When choosing to address the new issue, courts will often make conclusory statements that an exception to the general rule applies, but will not provide their underlying rationale.[22] As a result, the ad hoc nature of court practice reflects courts' unmeasured discretion[23] to consider new issues "[a]ny time [they] want[]."[24]

This Article provides a practitioner's perspective on federal court behavior in general, and actions of the Federal Circuit and the United States Court of International Trade (CIT) in particular, by addressing

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15. Martineau, *supra* note 1, at 1044-45, 1058; Miller, *supra* note 1, at 1278-79. Professor Martineau renames the presumption the "gorilla rule." Martineau, *supra* note 1, at 1023 n.*. That is, just as an 800-pound gorilla sleeps "[a]nywhere it wants," so too an appellate court considers new issues "[a]ny time it wants." *Id.* (citations omitted).

16. 428 U.S. at 120-21. 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."

17. *Id.* at 121 (citations omitted).

18. *See* Miller, *supra* note 1.

19. Essinger v. Liberty Mut. Fire Ins. Co., 534 F.3d 450, 453 (5th Cir. 2008).

20. 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 1287-88.

21. Martineau, *supra* note 1, at 1034 (collecting cases); Weigand, *supra* note 1, at 246-47 (collecting cases).

22. Martineau, *supra* note 1, at 1034 (collecting cases); Weigand, *supra* note 1, at 181, 246-47 (collecting cases).

23. Miller, *supra* note 1, at 1287.

24. Martineau, *supra* note 1, at 1023 n.* (internal quotation marks omitted).

issues untimely raised before these courts. While not seeking to create a comprehensive report of or to provide a theoretical explanation for judicial decision making in this respect, I do attempt to shed light on current realities of litigation.

At base, 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.

II. BACKGROUND: INSTANCES IN WHICH THE FEDERAL COURTS WILL REACH NEW ISSUES

Courts do attempt to provide the framework within which they exercise their discretion. Courts repeatedly state that they will address arguments not previously raised by the parties only in "exceptional" circumstances.[25] 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.[26] Nevertheless, I have attempted to collect the most common factors that go into courts' analyses and instances in which courts will consider issues not timely raised.[27]

A. Uncontroversial Exceptions

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

1. Subject Matter Jurisdiction

It is fairly uncontroversial that a court or the parties may raise the issue of subject matter jurisdiction at any time during the litigation.[28] Before federal courts address the merits of any case, it is "central to the

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25. *See, e.g.*, Hormel v. Helvering, 312 U.S. 552, 557 (1941); *see also* Weigand, *supra* note 1, at 181; Steinman, *supra* note 1, at 1563-64.

26. *See* Weigand, *supra* note 1, at 256-57.

27. I note that many of these exceptions or factors may rely upon the existence of other exceptions or factors; in other words, each of the exceptions or factors mentioned below is not necessarily outcome determinative.

28. 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.

legal process"[29] that they are satisfied that the requirements of Article III of the Constitution are met to preserve the federal judiciary's "limited role in the constitutional structure."[30] As a result, courts consider new issues implicating, among others, standing and ripeness.[31]

But many jurisdictional questions involve factual disputes that in certain cases would necessitate an appellate court remand to the trial court.[32] Moreover, the line between jurisdictional and nonjurisdictional issues is fuzzy.[33] Courts tend to disagree as to which doctrines implicate jurisdiction and which do not: for example, political questions,[34] the existence of "final agency action" to satisfy the Administrative Procedure Act,[35] and the like. Thus, at least one legal scholar has opined that the dichotomy between jurisdictional and nonjurisdictional issues is false or, at least, not useful.[36] The distinction is arguably not all that important because, as noted below, courts will often entertain nonjurisdictional issues that go to the their competence to hear the case.

2. Issue of Judicial Competence

Though Article III of the Constitution does not necessarily compel courts to do so, as an exercise of judicial restraint and to preserve judicial resources,[37] courts sometimes will entertain quasi-jurisdictional issues.[38] 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,[39] issue and claim preclusion,[40] abstention or avoidance of

29. Martineau, *supra* note 1, at 1045.

30. Frost, *supra* note 1, at 462; Martineau, *supra* note 1, at 1045-46; Weigand, *supra* note 1, at 261-63.

31. *See* Miller, *supra* note 1, at 1280 (collecting cases); Weigand, *supra* note 1, at 260 (collecting cases).

32. *See* Steinman, *supra* note 1, at 1576-77.

33. *Id.* at 1580.

34. *See* Schroder v. Bush, 263 F.3d 1169, 1171 n.1 (10th Cir. 2001) ("Deeply rooted ambiguity in the nature and justification of the political question doctrine has prevented clear classification of the appropriate type of dismissal in political question cases." (citation omitted)).

35. *See* Ad Hoc Shrimp Trade Action Comm. v. United States, 515 F.3d 1372, 1379 (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." (citations omitted)).

36. *See* Steinman, *supra* note 1, at 1580.

37. *See* Frost, *supra* note 1, at 462-63.

38. *See* Martineau, *supra* note 1, at 1047-51.

39. *See* Cravens, *supra* note 1, at 264-65 (collecting cases); Steinman, *supra* note 1, at 1584-85 (discussing Mitchell v. Forsyth, 472 U.S. 511 (1985)). *But see* Martineau, *supra* note 1, at 1049-50.

40. *See* Frost, *supra* note 1, at 462 (collecting cases).

constitutional issues,[41] comity,[42] and "the propriety or scope of an injunction or consent decree."[43]

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.

3. Pro Se Litigants

Courts liberally construe arguments of pro se litigants[44] and, accordingly, are more likely to consider untimely raised issues.[45] However, courts often dismiss frivolous cases *sua sponte*.[46]

4. Changes in Law or Facts

Courts will hear new issues if there has been a change in law,[47] either by statute[48] or by judicial decision.[49] 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."[50] Further, while a party may not tardily raise an issue overturned by new law,[51] the court, nonetheless, has the responsibility to apply the current law to that issue.[52]

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

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41. *See id.* (collecting cases); Miller, *supra* note 1, at 1280-81 (collecting cases); Cravens, *supra* note 1, at 264-65 (collecting cases); Martineau, *supra* note 1, at 1050-51.

42. *See* Miller, *supra* note 1, at 1280-81 (collecting cases).

43. *Id.* at 1281 (collecting cases).

44. Hughes v. Rowe, 449 U.S. 5, 9 (1980).

45. *See* Miller, *supra* note 1, at 1285; Cravens, *supra* note 1, at 265-66.

46. *See* Miller, *supra* note 1, at 1282.

47. Patterson v. Alabama, 294 U.S. 600, 607 (1935); Steinman, *supra* note 1, at 1559.

48. Forshey v. Principi, 284 F.3d 1335, 1355-56 (Fed. Cir. 2002).

49. Hormel v. Helvering, 312 U.S. 552, 558-59 (1941); *Forshey*, 284 F.3d at 1356; Kattan v. District of Columbia, 995 F.2d 274, 277 (D.C. Cir. 1993); Miller, *supra* note 1, at 1300; Weigand, *supra* note 1, at 268-69.

50. *Forshey*, 284 F.3d at 1356 (quoting United States v. Washington, 12 F.3d 1128, 1139 (D.C. Cir. 1994) (internal quotation marks omitted)).

51. *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)).

52. *Forshey*, 284 F.3d at 1356-57 (discussing Kamen v. Kemper Fin. Servs. Inc., 500 U.S. 90 (1991)); *see also id.* at 1356 n.19 (quoting United States v. Fitzgerald, 545 F.2d 578, 582 (7th Cir. 1976)).

appeal.[53] This practice is particularly problematic in administrative record cases, where the agency builds the record[54] and finds facts based on the information contained therein.[55]

B. Broad or Ambiguous Exceptions

However, the courts consider many exceptions or factors that lend themselves toward virtually unconfined court discretion.

1. Issue Goes to Governmental Structure

The Supreme Court has entertained new issues that go "to fundamental principles of the structure of the federal government."[56] For example, the Court has rejected, on the merits, postjudgment challenges to the validity of a federal court decision rendered by a panel that included a judge sitting by designation.[57]

2. A New Argument Rather Than a New Claim

The Supreme Court has also distinguished between a litigant who brings a new "claim" before the Court, which is not allowed absent an exception,[58] and a litigant who brings a new "argument" before the Court, which often is allowed.[59] As the Court held in *Kamen v. Kemper Financial Services, Inc.*, if a claim is timely raised, "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."[60] Following *Kamen*, in cases such as *Lebron v. National Railroad Passenger Corp.*, the Court determined that if a claim is properly brought before the court, it may consider any number of new arguments or theories underlying that claim.[61]

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53. *See* Miller, *supra* note 1, at 1300; Steinman, *supra* note 1, at 1559, 1564.

54. *See* Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

55. *See* Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966).

56. Steinman, *supra* note 1, at 1582.

57. *See, e.g.*, *id.* at 1582-83 (discussing Glidden Co. v. Zdanok, 370 U.S. 530 (1962)); *see also* Ninestar Tech. Co. v. Int'l Trade Comm'n, 667 F.3d 1373, 1382, 1385 (Fed. Cir. 2012) (addressing—but rejecting—a challenge to the ability of the Commission—a nonjudicial body—to assess a penalty that is "criminal in nature" on the grounds that doing so would implicate a potential violation of separation of powers).

58. Cravens, *supra* note 1, at 256; Frost, *supra* note 1, at 476.

59. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 382 (1995).

60. 500 U.S. 90, 99 (1991) (citations omitted); *see also* Cravens, *supra* note 1, at 258-61 (offering a more detailed discussion of this case).

61. *Lebron*, 513 U.S. at 382; *see also* U.S. Nat'l Bank of Or. 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

Not surprisingly, where a "claim" ends and an "argument" begins may be difficult to understand or predict,[62] and courts have not consistently drawn this line.[63] But despite ambiguity, courts consider new issues that are "inextricably linked" with the issue at hand,[64] involve "antecedent"[65] or "predicate"[66] questions of law that are "essential to [the] analysis,"[67] or are "ultimately dispositive of"[68] or "necessary to the resolution of other issues directly before it on appeal."[69] 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,[70] or to reach an argument that "goes to the heart of the claims on which they must rule."[71]

3. The Proper Resolution Is Beyond Any Doubt

Courts will address a new question if the answer is "clear" or "the proper resolution is beyond any doubt."[72] In this situation, appellate courts will not remand because they have determined that no further

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"claims" on the one hand, and "theories," "arguments," "frameworks," and "legal reasons" on the other. Cravens, *supra* note 1, at 257. 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. Frost distinguishes between "claims" or "theories" and "arguments." Frost, *supra* note 1, at 476. However, I refer in this Part to how federal courts identify and treat the latter category and apply the "correct" law thereto.

62. *See* Miller, *supra* note 1, at 1278; Steinman, *supra* note 1, at 1526-27.

63. *See* Cravens, *supra* note 1, at 257 n.21 (noting the inconsistency among courts on this issue, focusing specifically on the variations within different Supreme Court decisions).

64. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 n.8 (2005).

65. *See Nat'l Bank of Or.*, 508 U.S. at 447 (quoting Arcadia v. Ohio Power Co., 498 U.S. 73, 77 (1990) (internal quotation marks omitted)); Cravens, *supra* note 1, at 259; Miller, *supra* note 1, at 1282.

66. Pfizer, Inc. v. Teva Pharm. USA, Inc., 518 F.3d 1353, 1359 n.5 (Fed. Cir. 2008).

67. *City of Sherrill*, 544 U.S. at 214 n.8 (quoting R. STERN ET AL., SUPREME COURT PRACTICE 414 (8th ed. 2002) (internal quotation marks omitted)).

68. *Nat'l Bank of Or.*, 508 U.S. at 447 (quoting *Arcadia*, 498 U.S. at 77 (internal quotation marks omitted)).

69. Cordis Corp. v. Bos. Scientific Corp., 658 F.3d 1347, 1359 (Fed. Cir. 2011) (citing *Pfizer*, 518 F.3d at 1359 n.5; Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1244-45 (Fed. Cir. 2007); SUP. CT. R. 14.1(a)); *see* Weigand, *supra* note 1, at 219; Miller, *supra* note 1, at 1276; Steinman, *supra* note 1, at 1561.

70. Kamen v. Kemper Fin. Serv., Inc., 500 U.S. 90, 99 (1991); Forshey v. Principi, 284 F.3d 1335, 1356-57 (Fed. Cir. 2002) (discussing *Kamen*, 500 U.S. at 92, 94-95, 99); Miller, *supra* note 1, at 1276.

71. Frost, *supra* note 1, at 476.

72. Turner v. City of Memphis, 369 U.S. 350, 353 (1962); Singleton v. Wulff, 428 U.S. 106, 121 (1976) (citation omitted); *see also* Weigand, *supra* note 1, at 274; Martineau, *supra* note 1, at 1040; Steinman, *supra* note 1, at 1572-73.

benefit would come from a trial court's reexamination.[73] It goes without saying that this consideration itself is far from clear.[74]

4. Plain, Basic, or Fundamental Error

In accordance with the "plain error" exception,[75] 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] feel[s itself] at liberty to correct it."[76] This exception originally derives from criminal procedure,[77] but courts have applied the exception to civil cases as well,[78] though considerably less often.[79] The Supreme Court has cautioned that this exception is to be used in 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.'"[80] This is a case-specific, fact-based inquiry.[81] 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."[82]

5. 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 the factual circumstances.[83] Such

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73. Weigand, *supra* note 1, at 274; Martineau, *supra* note 1, at 1040; Steinman, *supra* note 1, at 1574.

74. Miller cynically notes, "Courts are more likely to decide 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, 510 (1958-59)).

75. Martineau, *supra* note 1, at 1052-56.

76. Wiborg v. United States, 163 U.S. 632, 658 (1896).

77. Martineau, *supra* note 1, at 1052 (discussing United States v. Atkinson, 297 U.S. 157 (1936)).

78. Miller, *supra* note 1, at 1283; Weigand, *supra* note 1, at 194 (discussing *Atkinson*, 297 U.S. 157).

79. Weigand, *supra* note 1, at 217 (collecting cases). In fact, Martineau appears to consider the plain error exception inapplicable to civil cases. Martineau, *supra* note 1, at 1053, 1055-56.

80. United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (citations omitted).

81. Weigand, *supra* note 1, at 196.

82. Martineau, *supra* note 1, at 1052.

83. *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; Weigand, *supra* note 1, at 266; Steinman, *supra*

purely legal issues include the construction of statutory provisions,[84] "the applicability of . . . constitutional provision[s], statute[s], or legal doctrine[s],"[85] the reconsideration of existing precedent, and the extent of the retroactivity of a court decision.[86] 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.[87]

Relatedly, courts have addressed new issues, even if they are not purely legal questions, if the record has been adequately developed.[88] But whether courts can fully and confidently determine whether the factual record is complete remains an open question.[89]

6. Constitutional Issue

Courts will reach arguments that raise constitutional issues[90] or issues of "constitutional magnitude."[91] But this tendency conflicts with the doctrine of abstention, which states that courts should avoid, whenever possible, questioning the constitutionality of state or federal statutes.[92] Thus, courts will also deem the constitutional nature of the issue as a reason *not* to consider it.[93]

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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).

84. CEMEX, S.A. v. United States, 133 F.3d 897, 902 (Fed. Cir. 1998); Martineau, supra note 1, at 1035.

85. Martineau, *supra* note 1, at 1035 (footnotes omitted).

86. Miller, *supra* note 1, at 1282.

87. 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." (footnote omitted)).

88. Weigand, *supra* note 1, at 264.

89. Steinman, *supra* note 1, at 1568.

90. *See, e.g.*, Nelson v. Adams USA, Inc., 529 U.S. 460, 469-70 (2000); Ninestar Tech. Co. v. Int'l Trade Comm'n, 667 F.3d 1373, 1382 (Fed. Cir. 2012); Consolidation Coal Co. v. United States, 351 F.3d 1374, 1378 (Fed. Cir. 2003).

91. 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)).

92. *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).

93. *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 ("Case law is somewhat conflicting, at once stating that unpreserved constitutional issues are subject to forfeiture just as any other claim; that a constitutional issue is usually of a greater magnitude then [sic] 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 first time on appeal." (footnote omitted)).

7. Important or Novel Issue Certain To Arise in Other Cases

When faced with what the court considers to be a "novel" or "important" issue of law, or a question of law "currently in a state of evolving definition and uncertainty" that is "likely to recur" in future cases,[94] the court sometimes will reach that issue even if parties have not timely raised it.[95]

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.[96] Some argue that the court can benefit from the parties' analysis[97] as well as the lower court's consideration of novel issues.[98] Perhaps most troublesome is the fact that decisions appear to be "nakedly political" because the issues deemed "important" vary among judges.[99]

8. Issue of Public Interest

When courts determine that consideration of the issue is in the public interest[100] or implicates issues of public policy,[101] they will at times address that new issue. Similar to the cases invoking the "important" legal issue exception, there is little guidance as to which issues will fall under this category. The ambiguity of this exception leaves much to the whim of the presiding judge or judges.

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94. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 255-57 (1981) (citations omitted); 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 Express, Inc. v. Compuserve Inc., 256 F.3d 1323, 1345 (Fed. Cir. 2001) (internal quotation marks omitted)).

95. *See* Steinman, *supra* note 1, at 1563 (quoting Salazar *ex rel.* Salazar v. District of Columbia, 602 F.3d 431, 437 (D.C. Cir. 2010) (quoting Flynn v. Comm'r, 269 F.3d 1064, 1069 (D.C. Cir. 2001))).

96. Martineau, *supra* note 1, at 1040-41.

97. *E.g.*, Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); Playboy Enters., Inc. v. Dumas, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997).

98. Weigand, *supra* note 1, at 282; *see* Israel Bio-Eng'g Project v. Amgen Inc., 475 F.3d 1256, 1265 (Fed. Cir. 2007).

99. Miller, *supra* note 1, at 1306-07.

100. *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.

101. Nuelsen v. Sorensen, 293 F.2d 454, 462 (9th Cir. 1961); Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 842 F.2d 977, 984 (8th Cir. 1988); Cravens, *supra* note 1, at 264-65; Weigand, *supra* note 1, at 219.

9. Notice of the Issue

Courts have reached new arguments even when the argument was not previously raised by the parties.[102] Similarly, a court may choose not to reach the issue when a party was on notice of the issue and did not timely raise it.[103]

However, courts will often look at new issues regardless of whether the parties were on notice of the issues[104] or whether the lower courts considered or were on notice of the issues.[105] If the issue was briefed adequately by the parties, courts will often entertain that new issue.[106] Courts will address new arguments if briefed, at least partially, even by nonparties, e.g., *amici*, before the court.[107] Courts have also reached untimely issues if they are discussed at least at oral argument.[108]

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

10. To Avoid Injustice

More broadly, and encompassing many of the factors/exceptions listed *supra*, 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[109] and has many formulations: "miscarriage of justice," "substantial risk of miscarriage of justice," "manifest injustice,"[110] "inconsistent with substantial justice,"[111] "interest of substantial justice,"[112] "injustice otherwise might result,"[113] or "as justice requires."[114] Courts

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102. *See* Weigand, *supra* note 1, at 268.

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

104. Consolidation Coal Co. v. United States, 351 F.3d 1374, 1378 (Fed. Cir. 2003). *But see* Amoco Oil Co. v. United States, 234 F.3d 1374, 1377 (Fed. Cir. 2000) (finding Amoco's constitutional argument to be forfeited because it did not raise the issue in its opening brief, but only in its response brief after the issue had been introduced by the opposing side).

105. Nelson v. Adams, 529 U.S. 460, 469-70 (2000); Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995); *see also Consolidation 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.

106. *See* Weigand, *supra* note 1, at 263-64.

107. *See* Miller, *supra* note 1, at 1284.

108. *See id.*

109. Weigand, *supra* note 1, at 274; Martineau, *supra* note 1, at 1041.

110. Weigand, *supra* note 1, at 274, 276 (internal quotation marks omitted).

111. Miller, *supra* note 1, at 1285 (internal quotation marks omitted).

112. Weigand, *supra* note 1, at 221 (quoting Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360-61 (11th Cir. 1984) (internal quotation marks omitted)).

113. Steinman, *supra* note 1, at 1573-74.

derive this exception from the Supreme Court's broad pronouncement in *Hormel v. Helvering* that a court may reach an unpreserved issue "where injustice might otherwise result."[115] In practice, the injustice exception can amount to consideration of new issues when those issues are outcome determinative or amount to reversible error.[116] Arguably this makes the words underlying the exception "almost meaningless."[117] Therefore, because it allows for substantial judicial discretion, the injustice exception may be "the most open to manipulation of all."[118]

C. Case-Specific Considerations

Rather than focusing only on the specific issue at hand, courts will often instead consider factors such as the posture of the case or the status of the parties.

1. 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 address that issue.[119] Yet, as others have noted, mandating that the adverse party show prejudice requires that party to speculate as to how the matter may have otherwise developed, when, indeed, "[d]efeat rather than victory is the ultimate prejudice."[120]

2. 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 will consider those issues.[121] This makes sense as a procedural matter, because waiver constitutes an affirmative defense.[122] But, it is conceptually difficult to understand how it is fair for the court to punish one party and reward the other.

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114. Patterson v. Alabama, 294 U.S. 600, 607 (1935).

115. 312 U.S. 552, 557 (1941).

116. 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").

117. Miller, *supra* note 1, at 1285.

118. *Id.* at 1307.

119. Pfizer, Inc. v. Teva Pharms. USA, Inc., 518 F.3d 1353, 1359 n.5 (Fed. Cir. 2008); Martineau, *supra* note 1, at 1036-40; Weigand, *supra* note 1, at 263, 265.

120. Martineau, *supra* note 1, at 1038.

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

122. *See* FED. R. CIV. P. 8(c)(1).

3. 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.[123] Courts may also address new issues if the trial court proceedings are in the early stages,[124] or to speed up already prolonged or delayed litigation.[125]

4. A 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 did not have an earlier opportunity to raise the argument,[126] or if raising the argument at an earlier time would have been a futile exercise,[127] courts use this exception.[128]

5. A Party's Reasons for Failure To Raise the Argument

If a party has not timely raised an argument and that failure results from inadvertence,[129] a court is more likely to entertain the new argument than if the tardiness was due to a party's tactical decision.[130] 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.[131]

D. Because the Court Wants To!

Perhaps there is really no rhyme or reason that explains how courts exercise discretion.[132] The exceptions are so vague that it is difficult to concoct a scenario in which one of them could potentially not apply. As one skeptic has determined, courts are more likely to reach an issue "if

123. *See* Steinman, *supra* note 1, at 1562, 1593; Cravens, *supra* note 1, at 270.
124. *See* Miller, *supra* note 1, at 1284.
125. *See* Weigand, *supra* note 1, at 219-20.
126. *See id.* at 268; *In re* Novack, 639 F.2d 1274, 1277 (5th Cir. 1981) (citing FED. R. CIV. P. 46).
127. Weigand, *supra* note 1, at 268.
128. 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).
129. Weigand, *supra* note 1, at 270.
130. Becton Dickinson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 800-01 (Fed. Cir. 1990); Weigand, *supra* note 1, at 270.
131. Weigand, *supra* note 1, at 271.
132. *See* Martineau, *supra* note 1, at 1061; Miller, *supra* note 1, at 1286.

they think a case is really important or if the judges really want to reach a particular result."[133]

III. PRACTICE BEFORE THE FEDERAL CIRCUIT

Naturally, the Federal Circuit[134] has addressed new issues involving jurisdiction.[135] But the Federal Circuit has announced and applied—in a summary manner—strong rules on forfeiture and waiver. First, issues a party did not raise in an opening brief,[136] or did not sufficiently brief,[137] are waived. Second, the court will waive issues the party did not raise in the court proceedings below.[138]

The Federal Circuit has emphasized that these rules exist to prevent unfairness to the adverse party, who would not have had notice of the issue,[139] or to the court,[140] who would then risk issuing ill-advised opinions in the absence of the benefit of the parties' and the lower court's analysis.[141] The court enforces rules of procedure[142] and prevents

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133. Miller, *supra* note 1, at 1287.

134. This analysis of cases in the Federal Circuit is limited to rulings made in writing on the record.

135. *See, e.g.*, Diggs v. Dep't of Hous. & Urban Dev., 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'n, 474 F.3d 1281, 1289 (Fed. Cir. 2007).

136. *See, e.g.*, Novosteel SA v. United States, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002); Hannon v. Dep't of Justice, 234 F.3d 674, 680 (Fed. Cir. 2000); Amoco Oil Co. v. United States, 234 F.3d 1374, 1377 (Fed. Cir. 2000); Gilda Indus., Inc. v. United States, 446 F.3d 1271, 1280 (Fed. Cir. 2006). Part and parcel to this rule, a trade plaintiff must raise all issues before the CIT prior to remand to the United States Department of Commerce (Commerce) in order to retain the ability to argue them before the court postremand. Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, No. 95-1485, 1996 U.S. App. LEXIS 19074, at *4-6 (Fed. Cir. Aug. 1, 1996).

137. *See* SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 (Fed. Cir. 2006). Arguments made in footnotes are also deemed to be waived. *Id.*

138. *See* Corus Staal BV v. United States, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007); Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997).

139. Carbino v. West, 168 F.3d 32, 34-35 (Fed. Cir. 1999) ("[R]easons for not permitting an appellant to raise issues of arguments in a reply brief [include] 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."); United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) ("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).

140. *Carbino*, 168 F.3d at 35.

141. Isr. Bio-Eng'g Project v. Amgen, Inc., 475 F.3d 1256, 1265 (Fed. Cir. 2007). The rules of waiver and forfeiture "permit[] the trial judge most familiar with the complex record to address the issue first." *Id.*; Cronin v. United States, 363 F. App'x 29, 33 (Fed. Cir. 2010) (refusing to address *sua sponte* an issue "without the benefit of the trial court's reasoned opinion on the matter").

142. Novosteel SA v. United States, 284 F.3d 1261, 1274 (Fed. Cir. 2002) ("[T]he 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.").

gamesmanship by refusing to consider untimely issues.[143] Moreover, the Federal Circuit has emphasized that it sits as a court of *review*, not as a trial court; the rules of waiver and forfeiture preserve that appellate structure.[144]

The Federal Circuit has also explained, in depth, its analysis of exceptions to these rules, particularly in *L.E.A. Dynatech, Inc. v. Allina*. The court has followed the United States Court of Appeals for the Eleventh Circuit in *Dean Witter Reynolds v. Fernandez*, 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.[145]

The Federal Circuit has also noted other exceptions, including the adoption of new legislation altering substance or procedure or a change in case law,[146] the court's obligation to apply the correct law,[147] when a party appears pro se,[148] the existence of "a serious issue of public policy,"[149] when "the record is complete, if there [would] be no prejudice to any party, . . . if no purpose [would be] served by remand to the district

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143. Smith v. Principi, 34 F. App'x 721, 725 (Fed. Cir. 2002). The rules "avoid encouraging appellants to change the grounds of appeal as they move up the judicial ladder" *Id.* (citations omitted); *Novosteel*, 284 F.3d at 1274 ("Raising 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, Inc. v. Allina, 49 F.3d 1527, 1532 (Fed. Cir. 1995).

144. Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("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 exceptions, such as some jurisdictional matters, appellate courts do not consider a party's new theories, lodged first on appeal. . . . In short, this court does not 'review' that which was not presented to the district court.").

145. *L.E.A. Dynatech*, 49 F.3d at 1531 (citing Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360-61 (11th Cir. 1984); *accord* Interactive Gift Express, Inc. v. Compuserve Inc., 256 F.3d 1323, 1344-45 (Fed. Cir. 2001).

146. Forshey v. Principi, 284 F.3d 1335, 1355-56 (Fed. Cir. 2002).

147. *Id.* at 1356.

148. *Id.* at 1357.

149. *Interactive Gift Express*, 256 F.3d at 1345 (citation omitted) (internal quotation marks omitted). The court has, on one occasion, reached a new argument because it implicated an issue of public policy. *See* Fomby-Denson v. Dep't of the Army, 247 F.3d 1366, 1373 (Fed. Cir. 2001). Here, the court refused to construe a settlement agreement to "bar[] the Army from referring [the petitioner] to the German authorities" because that construction would be contrary to public policy. *Id.*

court,"[150] or "where circumstances indicate that it would result in basically unfair procedure."[151] Nonetheless, the Federal Circuit has emphasized that exceptions to the rule are few and that judicial discretion to consider new issues should be exercised sparingly.[152]

But in practice, it is difficult to predict the Federal Circuit's behavior. The Federal Circuit often provides a rather cursory discussion on its determination of whether or not to entertain untimely raised issues.[153] This is particularly problematic when the court treats cases inconsistently without explanation.

For example, the Federal Circuit in *CEMEX, S.A. v. United States* addressed an argument, raised for the first time on appeal, as to the way the United States Department of Commerce (Commerce) should interpret 19 U.S.C. §§ 1677(16) and 1677b(a)(1).[154] In doing so, the Federal Circuit recognized that generally it will not hear new issues, but stated in a conclusory manner that because the appellant had raised "an issue of statutory interpretation," the court would reach the issue nonetheless.[155] 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.[156] But the Federal Circuit in *Forshey v. Principi* declined to reach untimely raised issues, claiming "no new statute . . . governs these proceedings."[157]

The Federal Circuit acts inconsistently in its treatment of new constitutional issues. In *Amoco Oil Co. v. United States*, the court

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150. *Interactive Gift Express*, 256 F.3d at 1345 (citation omitted) (internal quotation marks omitted)).

151. Becton Dickison & Co. v. C.R. Bard, Inc., 922 F.2d 792, 800 (Fed. Cir. 1990) (citations omitted).

152. Smith v. Principi, 34 F. App'x 721, 725 (Fed. Cir. 2002); *Forshey*, 284 F.3d at 1354, 1358; Novosteel SA v. United States, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002).

153. *See, e.g.*, Hannon v. Dep't of Justice, 234 F.3d 674, 680 (Fed. Cir. 2000) (rejecting an issue raised for the first time in the reply brief); *Novosteel*, 284 F.3d at 1273-74 (refusing to entertain an issue raised for the first time in CIT reply brief); United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006) (dismissing an issue raised in a three-sentence footnote in the reply brief); SmithKline Beecham Corp. v. Apotex Corp., 439 F.3d 1312, 1320 & n.9 (Fed. Cir. 2006) (dismissing an unpreserved argument because it saw "no reason to exercise its [*Becton Dickinson*] discretion"); CEMEX, S.A. v. United States, 133 F.3d 897, 902 (Fed. Cir. 1998) (deciding a new issue because it concerned statutory construction); Corus Staal BV v. United States, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007) (dismissing a new argument raised for the first time on appeal).

154. *See* 133 F.3d 897.

155. *Id.* at 902.

156. *See* Processed Plastic Co. v. United States, 473 F.3d 1164, 1172 (Fed. Cir. 2006); Rollerblade, Inc. v. United States, 282 F.3d 1349, 1353 (Fed. Cir. 2002).

157. 284 F.3d at 1358-59.

refused to consider constitutional challenges to the Harbor Maintenance Tax because they were not raised in Amoco's opening brief.[158] In the same vein, the court refused in *Smith v. Principi* to entertain the appellant's constitutional due process arguments because he did not raise them before the United States Court of Appeals for Veterans Claims and declared, "Constitutional issues in particular call forth a quality and depth of consideration not necessarily present in more ordinary appeals."[159] However, in *Ninestar Technology Co. v. International Trade Commission*, the court entertained an untimely raised constitutional challenge to a penalty assessed by the International Trade Commission (Commission).[160] Moreover, in *Consolidation Coal Co. v. United States*, the court addressed appellant's untimely raised 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 constitutional issue[]."[161] 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.[162]

Further, although the Federal Circuit has emphasized the risk of prejudice to adverse parties that may result from allowing consideration of tardily raised issues,[163] the court in *Pfizer, Inc. v. Teva Pharmaceuticals USA, Inc.*, quickly disposed of the adverse party's allegations of prejudice without further discussion.[164]

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 v. Adams*, determines that "the lower court [was] fairly put on notice as to the

158. 234 F.3d 1374, 1377 (Fed. Cir. 2000).
159. 34 F. App'x 721, 724-25 (Fed. Cir. 2002).
160. 667 F.3d 1373, 1382 (Fed. Cir. 2012).
161. 351 F.3d 1374, 1378 (Fed. Cir. 2003).
162. *Id.*
163. *See* Carbino v. West, 168 F.3d 32, 34-35 (Fed. Cir. 1999); United States v. Ford Motor Co., 463 F.3d 1267, 1277 (Fed. Cir. 2006); Viskase Corp. v. Am. Nat'l Can Co., 261 F.3d 1316, 1326 (Fed. Cir. 2001).
164. 518 F.3d 1353, 1359 n.5 (Fed. Cir. 2008) ("[W]e see no basis for the claim that Pfizer was somehow prejudiced by Teva's failure to raise this purely legal issue earlier in the proceeding.").

substance of the issue,"[165] and goes about its business making a determination on the new issue.[166]

But sometimes the court completely ignores the analysis explained in cases like *Forshey, L.E.A. Dynatech*, or even *Nelson*. Recently, in *Fischer S.A. Comercio, Industria & Agricultura v. United States*, the Federal Circuit remanded for Commerce to reconsider its zeroing methodology, even though this issue was not raised before the CIT and was only mentioned in passing in two footnotes in the appellate briefs.[167] Inexplicably, the Federal Circuit spent a significant amount of time on zeroing during oral argument[168] and, subsequently, determined that this was appropriate because the court was already remanding to Commerce on another issue.[169] The court provided no other discussion and failed to mention the factors involved in the exercise of its discretion to reach untimely issues.

Fischer is difficult to reconcile with cases like *Fuji Photo Film Co. v. Jazz Photo Corp.*, in which the court rejected an argument "raise[d] . . . in a footnote in [the] opposition brief and more fully in [the] reply brief."[170] Moreover, in *United States v. Ford Motor Co.*, the Federal Circuit refused to hear a new argument a party raised for the first time "in cursory fashion" in a "single three-sentence footnote" located in the reply brief.[171]

Presumably, the court in *Fischer* addressed zeroing, given the importance and uncertainty of the issue in light of the court's decisions in *Dongbu Steel Co. v. United States*[172] and *JTEKT Corp. v. United States*,[173] which changed the landscape of the analysis of the reasonableness of

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165. *See, e.g.*, *Consolidation Coal*, 351 F.3d at 1378 (quoting Nelson v. Adams USA, Inc., 529 U.S. 460, 469 (2000) (internal quotation marks omitted)). *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 (citation omitted).

166. These cases should be compared with *Fuji Photo Film Co. v. Jazz Photo Corp.*, 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 1368, 1377 (Fed. Cir. 2005).

167. 471 F. App'x 892, 896 (Fed. Cir. 2012). The brief stated "that there would have [been] no dumping margins . . . if [Commerce] had not applied its arbitrary zeroing methodology." *Id.* (citations omitted).

168. Oral Argument at 3:01-:07, 17:58-21:25, *Fischer*, 471 F. App'x 892 (No. 08-0277), *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/2011-1152/all.

169. *Fischer*, 471 F. App'x at 896.

170. 394 F.3d at 1375 n.4.

171. 463 F.3d 1267, 1277 (Fed. Cir. 2006).

172. *See* 635 F.3d 1363 (Fed. Cir. 2011).

173. 642 F.3d 1378 (Fed. Cir. 2011).

Commerce's use of zeroing in administrative reviews.[174] 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 SA v. United States*?[175] Does the Federal Circuit act haphazardly, reaching a new issue only when it thinks a case is really important or wants to reach a particular result?

IV. PRACTICE BEFORE THE COURT OF INTERNATIONAL TRADE[176]

The CIT also exercises its discretion without much discussion.[177] However, the CIT appears, at least on paper, to require more of litigants than the Federal Circuit. In general, the CIT is unwilling to consider arguments not briefed by the parties.[178] Often, the CIT has little patience even with insufficiently briefed arguments and invokes *United States v. Zannino*[179] to reject such arguments *sua sponte*.[180] Some judges, prior to the filing of USCIT Rule 56.2 motions, ordered the parties to provide the

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174. *JTEKT* itself reached the zeroing issue, though arguably untimely raised, ultimately due to the recent issuance of *Dongbu* after briefing had been completed. *Id.* at 1384. In comparison, the *Fischer* opening brief was filed *after* the *Dongbu* decision came down.

175. *See* 284 F.3d 1261 (Fed. Cir. 2002); *see also* discussion *supra* note 3.

176. Similar to the discussion of Federal Circuit behavior, this analysis of cases in the CIT is limited to 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.

177. *See, e.g.*, Bond St., Ltd. v. United States, 774 F. Supp. 2d 1251, 1265 n.13 (Ct. Int'l Trade 2011) (dismissing a new argument because it was not mentioned in the opening brief, but speaking to its merits out of caution); CEMEX, S.A. v. United States, 19 Ct. Int'l Trade 587, 594 (1995) (rejecting argument because affirmative defense not pled); Home Prods. Int'l, Inc. v. United States (*Home Prods II*), 837 F. Supp. 2d 1294, 1299-1300 (Ct. Int'l Trade 2012) (ignoring claim because it was not pled in the complaint); Nucor Corp. v. United States, 594 F. Supp. 2d 1320, 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); Firoze A. Fakhri D.B.A. Int'l Trading Co. v. United States, 31 Ct. Int'l Trade 1287, 1302 (2007) (reaching issue of unclean hands because the doctrine of unclean hands serves to protect the court's integrity).

178. *See, e.g.*, *Bond St.*, 774 F. Supp. 2d at 1265 n.13; *CEMEX*, 19 Ct. Int'l Trade at 594; *Home Prods. II*, 837 F. Supp. 2d at 1299-1300; *Nucor*, 594 F. Supp. 2d at 1374 n.36; KYD, Inc. v. United States, 836 F. Supp. 2d 1410, 1414 (Ct. Int'l Trade 2012).

179. 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues 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 omitted) (internal quotation marks omitted)).

180. *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 (*Home Prods I*), 810 F. Supp. 2d 1373, 1378-79 (Ct. Int'l Trade 2012); *Home Prods. II*, 837 F. Supp. 2d at 1300-02; *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).

CIT with preliminary outlines of their arguments, or offered specific instructions to parties as to expectations of arguments contained within the briefs.[181]

However, there are exceptions. Predictably, the CIT will raise issues of jurisdiction[182] or quasi-jurisdiction[183] on its own.

In addition, the CIT, on a few occasions, has issued procedural orders without requests from parties and without acknowledging the irregularity in doing so. It has *sua sponte* vacated prior orders, presumably pursuant to USCIT Rule 60(b),[184] though not always explicitly referenced as such.[185] The CIT has stayed cases *sua sponte* pending the outcome of appeals and of litigation concerning other administrative proceedings.[186] Recently the CIT has determined, *sua sponte*, that interlocutory appeal to the Federal Circuit "is appropriate" and crafted specific issues for appeal "[u]pon request [for certification] by the parties."[187] In *Baroque Timber Industries (Zhongshan) Co. v. United States*, the CIT dismissed one of the plaintiffs' complaints for lack of jurisdiction because that plaintiff failed to comply with the timing

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181. But it has also been the case that the CIT actually will, *sua sponte*, frame the issues for the parties, for example, in litigation challenging dumping determinations as to shrimp imports. *See* Amanda Foods (Viet.) Ltd. v. United States, Consol. Ct. No. 09-00431 (Ct. Int'l Trade May 30, 2012).

182. *See, e.g.*, Baroque Timber Indus. (Zhongshan) Co. v. United States, 865 F. Supp. 2d 1300, 1304 & n.6 (Ct. Int'l Trade 2012); Furniture Brands Int'l v. United States, 807 F. Supp. 2d 1301, 1307 (Ct. Int'l Trade 2011).

183. *See, e.g.*, 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*).

184.

> 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.

U.S. CT. INT'L TRADE R. 60(b).

185. *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*); *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).

186. *See* Apex Exps. v. United States, Consol. Ct. No. 11-00291 (Ct. Int'l Trade Aug. 6, 2012).

187. *See, e.g.*, *Baroque*, 865 F. Supp. 2d at 1310-11.

requirements of 19 U.S.C. § 1516a(a)(2).[188] The CIT questioned the jurisdictional nature of § 1516a(a)(2) and the applicability of equitable tolling to that provision, and thus suggested that the party seek appeal on these issues before litigation would continue.[189]

There are a few instances in which the CIT 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 when it will exercise it.

In *Home Products International, Inc. v. United States* (*Home Products II*), the plaintiff argued that an intervening change in case law excused its failure to raise a timely challenge to Commerce's rejection of the plaintiff's case brief.[190] The CIT determined that *Grobest & I-Mei Industry v. United States* 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.[191]

In *Firoze A. Fakhri D.B.A. International Trading Co. v. United States*, the CIT 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.[192] According to the CIT, "[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."[193]

Additionally, in *KYD, Inc. v. United States*, the CIT rejected reconsideration of the waived Eighth Amendment constitutional challenge to Commerce's adverse determination on the available dumping rate because the challenge was not an issue that involved "significant questions of general impact or of great public concern."[194] Of note, the CIT 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.[195]

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 addressing its merits. The Federal Circuit separates the analysis,

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188. *Id.* at 1309-10.
189. *Id.*
190. 837 F. Supp. 2d 1294, 1299-1300 (Ct. Int'l Trade 2012)).
191. *Id.*
192. 31 Ct. Int'l Trade 1287, 1301-02 (2007).
193. *Id.* (citations omitted).
194. 836 F. Supp. 2d 1410, 1414 (Ct. Int'l Trade 2012) (internal quotation marks omitted).
195. *Id.* at 1414-15.

first looking to the importance of the issue and/or the propriety of reaching the constitutional issue, and only *then* reaches the merits.[196] If the analysis is—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 A/S (Now Norwegian Salmon A/S) v. United States*, decided in 1992.[197] There, the CIT, in reviewing a Commission material injury determination for substantial evidence, reached the legal issue of whether "lingering effects [could] satisfy the present injury requirement."[198] The defendant-intervenors argued that the plaintiffs had not timely raised this issue; the CIT disagreed, reading the complaint broadly to encompass that issue.[199] Yet the CIT held, in the alternative, that even if the plaintiffs had not made the argument, the court could address the lingering effects issue because it was "fundamental" to the substantial evidence review and was an "inherent, underlying legal issue" such that "the issue was manifestly raised before it."[200] In other words, consistent with *Kamen*, inter alia, the lingering effects question was a predicate legal issue necessary for the resolution of the case.

Curiously, the CIT further determined that the lingering effects question implicates interests of public policy, particularly the demand for "sound and reasoned judicial decisionmaking."[201] The public interest issue that the CIT applied in this case is overwhelmingly broad, as, arguably, reaching any relevant meritorious issue would contribute to "sound and reasoned judicial decisionmaking."[202]

Another interesting decision from the CIT is *Atar, s.r.l. v. United States*.[203] In that case, the CIT reached the issue of Commerce's alleged application of a minimum profit cap requirement contrary to *Floral Trade Council v. United States*,[204] despite the fact that the plaintiff failed to

196. *See, e.g.*, Ninestar Tech. Co. v. Int'l Trade Comm'n, 667 F.3d 1373, 1382-85 (Fed. Cir. 2012).

197. 16 Ct. Int'l Trade 1043 (1992).

198. *Id.* at 1043-44 (citation omitted).

199. *Id.* at 1044-45 & n.1.

200. *Id.* at 1045.

201. *Id.* at 1046. *Chr. Bjelland Seafoods* is the only case the author has found in which the CIT applies the public interest exception.

202. *Id.*

203. 703 F. Supp. 2d 1359 (Ct. Int'l Trade 2010).

204. 23 Ct. Int'l Trade 20, 30-34 (1999).

make the argument.[205] The CIT openly admitted that it could ignore the issue "on a waiver theory," but analyzed the issue in its discretion because the plaintiff "impliedly relie[d] on the reasoning of [*Floral Trade Council*]" and the CIT felt compelled to consider the profit cap requirement given the issue's "full implications."[206] In addition, the CIT determined that consideration of Commerce's compliance with *Floral Trade Council* was "antecedent . . . and ultimately dispositive of" the legal issue at hand.[207] The CIT proceeded to remand the case to Commerce on the issue of the profit cap requirement.[208]

Ultimately, the CIT does not regularly provide much insight into the considerations that guide it when it addresses or rejects untimely arguments. Perhaps members of the CIT 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 CIT, and assisting in maintaining high standards for members of the trade bar.

V. WHY THE COURTS SHOULD ENFORCE THE GENERAL RULE

These realities aside, it is problematic when the courts do the parties' job 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, which relies on the parties to present issues to the court.[209] In many cases, the parties are in the best position to develop arguments, and the courts can make better decisions because of that development.[210] Trade cases involve repeat players, challenging investigations, and successive administrative reviews on duties imposed on goods that have been 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

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205. *Atar*, 703 F. Supp. 2d at 1365-66.

206. *Id.*

207. *Id.* at 1366 (internal quotation marks omitted).

208. *Id.* at 1366-67.

209. *See* Greenlaw v. United States, 554 U.S. 237, 243-44 (2008); Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1278 (10th Cir. 1994); *see also* Frost, *supra* note 1, at 456-58; Weigand, *supra* note 1, at 183-84.

210. *See Greenlaw*, 544 U.S. at 243-44; *see also* Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983); Frost, *supra* note 1, at 461.

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.[211]

We do, and should, have high expectations of the government and private attorneys in the trade bar.[212] Expecting the court to develop the parties' arguments diminishes counsel responsibility and reduces competition.[213] The trade bar itself is comprised largely of attorneys who specialize in trade litigation and who have singular knowledge of the issues in play, given that they see the cases through both administrative and judicial proceedings.[214]

Admittedly, ours is also a flexible system of justice in which, at the trial court level, amendments to pleadings are liberally allowed.[215] But limiting consideration to timely raised issues comports with notions of fundamental fairness and avoids prejudice to the adverse party[216] because the latter party is then given sufficient notice of the issue and an opportunity to be heard consistent with principles of due process.[217] Additionally, the adverse party is not ambushed by new issues and has time to develop its arguments adequately.[218] In the context of trade cases,

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211. *See* Weigand, *supra* note 1, at 183; Martineau, *supra* note 1, at 1029-31; Cravens, *supra* note 1, at 272, 296.

212. *See* Miller, *supra* note 1, at 1270.

213. 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. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2012). Of course, the USCIT Rules allow for the imposition of sanctions against attorneys and parties if the legal arguments are frivolous or not supported by existing law, U.S. CT. INT'L TRADE R. 11(b)(2), (c), and the Model Rules instruct attorneys to avoid making frivolous arguments, MODEL RULES OF PROF'L CONDUCT R. 3.1. Further, the court, as an impartial arbiter, should not reward tactical decisions made by parties not to raise issues in a timely manner. *See* Steinman, *supra* note 1, at 1565-66; Martineau, *supra* note 1, at 1030-31.

214. 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.

215. *See* Miller, *supra* note 1, at 1271 (discussing FED. R. CIV. P. 15(b), 54(c)).

216. *See* Hormel v. Helvering, 312 U.S. 552, 556 (1941); Carbino v. West, 168 F.3d 32, 35 (Fed. Cir. 1999); Weigand, *supra* note 1, at 184, 186; Miller, *supra* note 1, at 1267; Martineau, *supra* note 1, at 1031; Rooklidge & Weil, *supra* note 1, at 735.

217. *See Carbino*, 168 F.3d at 34-35; Frost, *supra* note 1, at 460; Weigand, *supra* note 1, at 186, 250; Miller, *supra* note 1, at 1260, 1288-92, 1294.

218. *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, courts sometimes remand the issue to the lower court instead of deciding it in the first instance. *See id.* at 1300-01, 1305; Steinman, *supra* note 1, at 1534; Cravens, *supra* note 1, at 267-68.

a private party's opportunity to respond to Commerce's arguments should be consistent with that required during administrative proceedings. Notice also allows Commerce to prepare and provide that reasoning or explanation in briefing, or to take voluntary remands where appropriate.[219]

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.[220] The Federal Circuit, as an appellate court, sits to review underlying trial court determinations,[221] not to make its own findings of fact[222] or to transform every appeal into a de novo proceeding.[223] The role of the CIT is to address legal issues in the first instance for Federal Circuit review.[224] Allowing the CIT to entertain the issue first provides the Federal Circuit the benefit of the CIT's decision[225] and maintains the CIT's legitimacy.[226]

The general rule also increases the finality of judicial decision making[227] and conserves judicial resources. The courts, in particular the Federal Circuit, do not have the resources to act as advocates for the parties.[228] Additionally, consistent with USCIT Rule 1, which reflects the need for streamlined trade litigation to minimize trade disruption,[229] the general rule maximizes judicial efficiency. Appellate proceedings are more efficient because the Federal Circuit has the benefit of the party

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219. This can be particularly acute when the first opportunity given to Commerce to address an issue is through government or private counsel at oral argument, neither of whom possess the authority to provide the court with *post hoc* defenses of Commerce determinations.

220. *See* Weigand, *supra* note 1, at 180-81; Steinman, *supra* note 1, at 1565.

221. *See* Sage Prods., Inc., v. Devon Indus. Inc., 126 F.3d 1420, 1426 (Fed. Cir. 1997); Weigand, *supra* note 1, at 245; Steinman, *supra* note 1, at 1522.

222. *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 & Weil, *supra* note 1.

223. *See* Martineau, *supra* note 1, at 1034.

224. Steinman, *supra* note 1, at 1603.

225. *See* District of Columbia v. Air Fla., Inc., 750 F.2d 1077, 1084-85 (D.C. Cir. 1984); Weigand, *supra* note 1, at 185-86, 266; Steinman, *supra* note 1, at 1523.

226. *See* Weigand, *supra* note 1, at 245; Miller, *supra* note 1, at 1267; Rooklidge & Weil, *supra* note 1, at 739.

227. *See* Frost, *supra* note 1, at 461, 476; Weigand, *supra* note 1, at 183-84.

228. *See* Frost, *supra* note 1, at 461; Cravens, *supra* note 1, at 272-73, 279-80. But perhaps the cynic would argue that the CIT itself, given its lighter case load, has adequate resources and expertise to play advocate.

229. USCIT Rule 1 states that the Rules of the CIT "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." U.S. CT. INT'L TRADE R. 1.

briefing and court analysis from proceedings below.[230] The court can dispose of the appeal without needing to address new issues[231] and without violating the constitutional avoidance doctrine.[232] Moreover, raising issues before the CIT in the first instance results, at least theoretically, in fewer CIT errors and fewer appeals.[233] CIT proceedings are more efficient because addressing issues at the first possible time avoids needless proceedings pre- or post-appeal.[234]

My greatest concern 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.[235] Courts currently exercise their discretion in a completely unpredictable manner, which results in the unequal treatment of parties.[236]

It is not surprising that court decisions are inconsistent and appear unfair. The exceptions applied by the CIT and the Federal Circuit—when indeed the courts do recognize and apply them—are overwhelmingly large in number and, in many cases, so broad or ambiguous as to

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230. *See* Smith v. Principi, 34 F. App'x 721, 725 (Fed. Cir. 2002); *see also* Rooklidge & Weil, *supra* note 1, at 735-36.

231. *See* Miller, *supra* note 1, at 1267.

232. *See* Frost, *supra* note 1, at 456-57, 479.

233. *See* Steinman, *supra* note 1, at 1603-04. It could be argued that court consideration of all issues, even those not raised properly before the court, serves the purpose of the antidumping (AD) and countervailing duty (CVD) statutes to "determin[e] current margins as accurately as possible." Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990). But it is not certain that the court's consideration of new relevant issues, whether 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 CVD 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 AD or CVD 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 F.3d 1362, 1365 (Fed. Cir. 1999) (citation omitted). 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). Thus, judicial restraint in considering or developing new 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 v. West, 168 F.3d 32, 35 (Fed. Cir. 1999); Cravens, *supra* note 1, at 279-80; Miller, *supra* note 1, at 1266-67.

234. *See* Martineau, *supra* note 1, at 1029, 1031-32; Steinman, *supra* note 1, at 1565-66; Weigand, *supra* note 1, at 185-86.

235. *See, e.g.*, Martineau, *supra* note 1, at 1033-34; Weigand, *supra* note 1, at 252; Frost, *supra* note 1, at 463-64; *see also* Essinger v. Liberty Mut. Fire Ins. Co., 534 F.3d 450, 453 (5th Cir. 2008).

236. 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.

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.[237]

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,[238] and although the CIT has explained the distinction between "legal" and "factual" issues[239] and how judicial review of legal and factual issues differs,[240] 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 case—is legal in the sense that the court does not develop facts or make factual findings. 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.[241] Absent Commerce action on remand, the facts on the record do not change and the court reviews only the sufficiency of that record and the legal conclusions made therefrom.[242] 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 or the Federal Circuit to raise arguments *sua sponte* or address untimely raised issues. I recognize that the court, not the parties, should independently

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237. *See generally* Nelson v. Adams USA, Inc., 529 U.S. 460 (2000).

238. *See* Steinman, *supra* note 1, at 1568-70.

239. *See, e.g.*, Dorbest Ltd. v. United States, 30 Ct. Int'l Trade 1671, 1675-77 (2006) ("Whether a data set selection issue is factual or legal, *i.e.*, reviewed for substantial evidence or for its accordance 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)).

240. The CIT holds unlawful Commerce AD and CVD determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). 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).

241. *See* Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620-21 (1966); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 & n.15 (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).

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

control statements of law,[243] and that the court has the responsibility to say "what the law is"[244] and to develop its own philosophies or methods to interpret the law.[245] The court cannot rely on inaccurate or misleading statements of law even if propounded by the parties.[246] The court does not—and should not—sit as merely an umpire "calling balls and strikes,"[247] but instead announces broad guidelines and rules for future cases.[248]

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,[249] or, by addressing new issues, a court may avoid answering constitutional or other questions to maintain the balance of powers.[250]

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,[251] the Federal Circuit and the CIT included. In fact, federal courts nationwide have applied "no less than thirty (30) factors, considerations, or separate singular exceptions to the raise or lose general rule," such that it is "impossible to devise any workable scale or means of measure as to value any one 'factor' versus another."[252] Thus, court behavior conflicts with the principle that trade laws should be administered and enforced in a consistent and predictable manner,[253] and, more generally, detracts from the public legitimacy and the parties' acceptance of judicial decisions.[254]

VI. CONCLUSION

What are the expectations of parties and, by extension, the parties' attorneys in the CIT and the Federal Circuit? In other words, when will

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243. *See* Frost, *supra* note 1, at 452-53.

244. *See id.* at 470-71 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (internal quotation marks omitted)).

245. *See id.* at 476-77.

246. *See id.* at 452, 473, 476.

247. *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.

248. *See id.* at 1273-74.

249. *See* Cravens, *supra* note 1, at 278.

250. *See* Frost, *supra* note 1, at 479-80.

251. *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.

252. Weigand, *supra* note 1, at 253.

253. Wheatland Tube Corp. v. United States, 17 Ct. Int'l Trade 1230, 1237 & n.11 (1993).

254. *See* Weigand, *supra* note 1, at 245, 248.

the courts save the parties from themselves? Unfortunately, as noted in *Essinger v. Liberty Mutual Fire Insurance Co.*, this "is a question with no certain answer."[255] 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 CIT has an extensive analysis it conducts in determining whether, pursuant to 28 U.S.C. § 2637(d),[256] it should require a party to exhaust administrative remedies,[257] on the record the CIT tends to summarily dismiss issues not preserved in a party's opening brief. The CIT 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 the CIT's 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, i.e., that the CIT's determination was "clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law."[258]

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.[259] More realistically, if the case is already on appeal, the parties can have and have had success raising new issues at oral argument or at least in some fashion (even in one sentence!) in the briefs.

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255. 534 F.3d 450, 453 (5th Cir. 2008).

256. "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006).

257. The CIT has recognized limited exceptions to the exhaustion requirement, including when (1) the plaintiff raises a pure question of law that does not require further agency involvement, (2) the "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. Corus Staal BV v. United States, 30 Ct. Int'l Trade 1040, 1050 & n.11 (2006); Asahi Seiko Co. v. United States, No. 09–00415, slip op. at *16-20 (Ct. Int'l Trade Mar. 1, 2011). Many of these exceptions are similar to those that apply to waiver and forfeiture, but the CIT recognizes and analyzes these exceptions far more often than with waiver or forfeiture.

258. *See* Hohenberg Bros. Co. v. United States, 301 F.3d 1299, 1303 (Fed. Cir. 2002) (citation omitted).

259. That said, parties that choose not to appeal may still benefit from appeals taken by other parties to an action. *See, e.g.*, Dongbu Steel Co. v. United States, 635 F.3d 1363 (Fed. Cir. 2011). In *Dongbu*, Dongbu did not take an appeal to the Federal Circuit, relying instead upon the appeal taken by Union Steel Manufacturing Company. *Id.* at 1368-69.

At the end of the day, the Federal Circuit and the CIT, like most other federal courts, appear to arbitrarily pick and choose when to save parties that failed 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,"[260] perhaps even guided by a judge's political persuasion.[261] Unfortunately, it is difficult for me to disagree with this statement.

260. Martineau, *supra* note 1, at 1058; Weigand, *supra* note 1, at 246; *see also* Miller, *supra* note 1, at 1256, 1286; Frost, *supra* note 1, at 463-64.

261. *See* Miller, supra note 1, at 1260-61, 1306-07; Weigand, *supra* note 1, at 281-82.