

The Year in Review

Volume 53 *International Legal Developments*
Year in Review: 2018

Article 3

January 2019

Customs Law

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Recommended Citation

Rebecca Rodriguez, *Customs Law*, 53 ABA/SIL YIR 5 (2019)

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Customs Law

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I. Introduction

This Article summarizes important developments in 2018 in customs law, including U.S. judicial, legislative, administrative, and executive, and trade developments.¹

II. U.S. Judicial Changes and Appointments

There were no changes to the U.S. Court of Appeals for the Federal Circuit or U.S. Court of International Trade in 2018.

III. Review of Customs-Related Determinations

A. OVERVIEW OF DECISIONS BY THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC)

1. *Converse, Inc. v. International Trade Commission*²

Shoe manufacturer Converse, Inc. (Converse) appealed a 2016 final determination of the International Trade Commission (ITC),³ which held invalid Converse's trademark in the midsole design of its Chuck Taylor All Star shoes, U.S. Trademark Registration No. 4,398,753 ('753 Trademark').⁴

In 2016, the ITC found the '753 Trademark invalid and that Converse could not establish the existence of common-law trademark rights.⁵ The ITC determined there was no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (2012), by the importation of the accused infringing products.⁶ The ITC nonetheless addressed infringement,

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1. For developments during 2017, see Luis F. Arandia, et al., *Customs Law*, 52 INT'L LAW. 5 (2018).

2. *Converse, Inc. v. U.S. Int'l Trade Comm'n*, 909 F.3d 1110 (Fed. Cir. 2018).

3. In the Matter of Certain Footwear Products, USITC Inv. No. 337-TA-936 (U.S. Int'l Trade Comm'n July 6, 2016).

4. *Converse, Inc.*, 909 F.3d at 1113; The mark consists of the design of the two stripes on the midsole of the shoe, the design of the toe cap, the design of the multi-layered toe bumper featuring diamonds and line patterns, and the relative position of these elements to each other, Registration No. 4,398,753.

5. *Id.*

6. *Id.*

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finding that if the mark were valid, the various accused products would have infringed Converse's mark.⁷ An appeal followed.⁸

On appeal, the CAFC held the ITC erred in applying the wrong standard in aspects of both its invalidity and infringement determinations.⁹ Specifically, the CAFC held the following:

owner's registration of trademark was entitled to presumption of secondary meaning beginning only as of the date of registration; in evaluating the length, degree, and exclusivity of use factor used to determine whether owner's trademark had acquired secondary meaning, the ITC should have relied principally on uses of the mark in the five year period before first infringing uses and date of registration; and the trademark was nonfunctional, and thus was protectable.¹⁰

The CAFC reversed the ITC's determination and remanded for further proceedings.¹¹

2. *DBN Holdings v. International Trade Commission*¹²

DBN Holdings, Inc. (DBN) and BDN LLC (BDN) appealed a decision of the ITC which denied their petition to rescind or modify a civil penalty order involving U.S. Patent No. 7,991,380 ('380 Patent).¹³

In 2013, DBN (formerly known as "DeLorme") entered into a Consent Order with the ITC, wherein DBN agreed to stop importing certain satellite communication devices accused of infringing the '380 Patent.¹⁴ Shortly thereafter, the ITC reopened the action, assessing a \$6.2 million penalty against DBN, finding it violated the terms of the Consent Order.¹⁵

Meanwhile, the U.S. District Court for the Eastern District of Virginia (EDVA) found the underlying '380 Patent claims invalid.¹⁶ Both cases were appealed to the CAFC and were affirmed.¹⁷ The CAFC agreed that the '360

7. *Id.*

8. *Id.* at 1112.

9. *Id.* at 1113.

10. *Id.* at 1111.

11. On remand, the ITC must constrain its analysis of both Converse's use and the use by its competitors to marks substantially similar to Converse's registered mark On remand, the ITC should reassess the accused products to determine whether they are substantially similar to the mark in the infringement analysis. *Id.* at 1122, 1124.

12. *DBN Holding, Inc. v. U.S. Int'l Trade Comm'n*, No. 2017-2128, 2018 WL 6181653 (Fed. Cir. Nov. 27, 2018).

13. *Id.* at *2; U.S. Patent No. 7,991,380 (filed Mar. 30, 2006).

14. *Certain Two-Way Global Satellite Communication Devices, Systems and Components Thereof*, USITC, Inv. No. 337-TA-854 (June 10, 2014).

15. *Id.*

16. *DeLorme Publ'g Co. v. BriarTek IP, Inc.*, 60 F. Supp. 3d 652, 683-84 (E.D. Va. 2014) (holding claims in a patent for a simple text messaging device used to send and receive short messages in the event of emergency were invalid for obviousness).

17. *DeLorme Publ'g Co. v. BriarTek IP, Inc.*, 622 F. App'x 912, 913 (Fed. Cir. 2015) (mem.).

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Patent claims were invalid,¹⁸ but DBN nonetheless violated the terms of the Consent Order.¹⁹ DBN filed a petition for rehearing *en banc* with the CAFC, which was denied.²⁰ DBN then filed a petition for certiorari with the United States Supreme Court, which was also denied.²¹

During the pendency of those proceedings, DBN filed a separate petition with the ITC.²² In the separate petition, DBN claimed the EDVA's judgment of invalidity constituted "changed conditions in fact or law or in the public interest," which warranted the ITC rescinding or modifying the civil penalty order pursuant to 19 C.F.R. § 210.76.²³ The ITC denied DBN's petition on the basis of *res judicata*.²⁴ An appeal followed.²⁵

On appeal, the CAFC concluded the ITC erred by relying on *res judicata* as its basis for denial because neither the ITC nor the CAFC considered whether to rescind or modify the civil penalty in light of the invalidity of the relevant patent claims,²⁶ but opined that law of the case may be the more appropriate doctrine to warrant denial.²⁷

The CAFC reversed the ITC's *res judicata* determination, and remanded for the ITC to consider whether to rescind or modify the civil penalty in light of the EDVA's final judgment of invalidity of the relevant claims of the '380 Patent.²⁸

B. OVERVIEW OF U.S. COURT OF INTERNATIONAL TRADE CASES

The United States Court of International Trade (CIT) has exclusive jurisdiction over any civil action commenced pursuant to 28 U.C.S. §§ 1581

18. *Id.* at 913.

19. *See* DeLorme Publ'g Co. v. U.S. Int'l Trade Comm'n, 805 F.3d 1328, 1336 (Fed. Cir. 2015).

20. In the Matter of Certain Two-Way Global Satellite Communication Devices, System and Components Thereof, USITC, Inv. No. 337-TA-854 (April 4, 2017).

21. *See* DBN Holding, Inc. v. U.S. Int'l Trade Comm'n, 137 S. Ct. 538 (Nov. 28, 2016) (mem.).

22. *See* DBN Holding, Inc., No. 2017-2128, 2018 WL at *2.

23. *Id.* (citing 19 C.F.R. § 210.76 (2010)).

24. In the Matter of Certain Two-Way Global Satellite Communication Devices, System and Components Thereof, USITC, Inv. No. 337-TA-854 (April 4, 2017).

25. *See* DBN Holding, Inc., No. 2017-2128, 2018 WL at *2.

26. *Id.* at *1.

27. *Id.* at *3 ("The [ITC] might have more appropriately referred to the basis of its denial of the petition as barred by the 'law of the case' doctrine, rather than generally invoking '*res judicata*.'").

28. *Id.* at *4.

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and 1582.²⁹ In the context of customs litigation, the two subparagraphs of § 1581 most frequently invoked by litigants are subparagraphs (a)³⁰ and (i).³¹

1. *Cases Involving Presidential Proclamations*

On March 8, 2018, President Trump issued Presidential Proclamation 9704 of March 8, 2018 (Proclamation 9704).³² Therein, President Trump cited to national security reasons and his authority under section 232 of the Trade Expansion Act,³³ stating “aluminum articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”³⁴ Effective March 23, 2018, Proclamation 9704 imposed a ten percent ad valorem tariff on aluminum articles imported from all countries except Canada and Mexico.³⁵

On the same date, President Trump issued Presidential Proclamation 9705 of March 8, 2018 (Proclamation 9705).³⁶ Therein, President Trump, again citing to national security reasons, invoked section 232 of the Trade Expansion Act of 1962, stating “steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States.”³⁷ Effective March 23, 2018, Proclamation 9705 imposed a twenty-five percent ad valorem tariff on steel articles imported from all countries except Canada and Mexico.³⁸ On

29. Any civil action

which arises out of an import transaction and which is commenced by the United States: (1) to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930; (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties.

28 U.S.C. § 1582 (2006).

30. 28 U.S.C. 1581(a) provides that the “Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.” 28 U.S.C. 1581 (2006).

31. *Id.* § 1581(i) (providing a broader and more general grant of jurisdiction, including actions arising from matters related to “(1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.”)

32. Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018).

33. “Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.” *Id.* ¶ 5; see 19 U.S.C. § 1862 (c)(1)(A) (2012).

34. Proclamation No. 9704, 83 Fed. Reg. 11619 (Mar. 8, 2018).

35. *Id.* at ¶ 7.

36. Proclamation No. 9705, 83 Fed. Reg. 11625 (Mar. 8, 2018).

37. *Id.* at ¶ 5.

38. *Id.* at ¶ 8.

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March 22, 2018, Proclamation 9705 was amended by Presidential Proclamation 9711, to extend additional temporary exemptions to Australia, Argentina, Brazil, the member countries of the European Union, and South Korea.³⁹ These temporary exemptions expired May 1, 2018.⁴⁰ Lawsuits followed.

a. *Severstal Export GMBH v. United States*⁴¹

On March 22, 2018, Severstal Export GMBH (Severstal Export) and Severstal Export Miami Corporation (Severstal Miami) (collectively, “Severstal”) filed suit against the United States of America, U.S. Customs and Border Protection (CBP) Commissioner Kevin K. McAleenan, U.S. Department of Commerce (Commerce) Secretary Wilbur L. Ross, and President Donald Trump.⁴²

In its complaint, Severstal sought to enjoin the government’s enforcement of Proclamation 9705, as subsequently amended by Proclamation No. 9711 (collectively, the “Steel Tarriff”).⁴³ Specifically, Severstal challenged the lawfulness of the Steel Tariff, as applied to Severstal’s expected steel imports, and sought a preliminary injunction to prevent the government from collecting the additional twenty-five percent tariff pending a decision on the merits of its action.⁴⁴ Severstal also sought a declaration from the CIT finding the Steel Tariff unconstitutional, and “not tied to the interest of protective national security.”⁴⁵

Finding the requisite factors for injunction were not sufficiently present, the CIT issued an opinion and order denying Severstal’s request for injunction.⁴⁶ On May 2, 2018, the parties filed a joint stipulation of dismissal with prejudice of all claims in the action.⁴⁷

39. Proclamation No. 9711, 83 Fed. Reg. 13361 (Mar. 22, 2018).

40. *Id.* at ¶ 14.

41. *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. (BNA) 3084 (Ct. Int’l Trade 2018).

42. *Id.* at *1.

43. *Id.*

44. *Id.* at *2.

45. Complaint at 2, *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int’l Trade 2018) (No. 18-00057).

46. [T]he court finds that plaintiffs have made a showing, but not a particularly strong showing, of irreparable harm. The degree of potential harm is thus insufficient to overcome plaintiffs’ low likelihood of success on the merits. The balance of hardships and public interest are insufficiently weighted in plaintiffs’ favor to overcome the deficiencies in the first two factors, which are central to the court’s analysis. Therefore, a preliminary injunction will not issue.

Severstal Exp. GMBH, 39 I.T.R.D. at *11.

47. *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int’l Trade 2018) (No. 18-00057) (Order Granting Joint Stipulation of Dismissal).

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b. American Inst. for Int'l Steel, Inc., et al., v. United States⁴⁸

On June 27, 2018, American Institute for International Steel, Inc. (AIIS), Sim-Tex LP (SimTex), and Kurt Orban Partners, LLC (Orban) collectively filed suit against the United States and CBP Commissioner Kevin K. McAleenan.⁴⁹ In their joint complaint, AIIS, SimTex, and Orban sought the following:

a declaratory judgment that section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 (“section 232”), is unconstitutional as an improper delegation of legislative power to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects.⁵⁰

They also sought an order from the CIT enjoining the government from enforcing the twenty-five percent tariff increase for imports of steel products and other trade barriers imposed by the Steel Tariff.⁵¹ Distilled to its essence, AIIS, SimTex, and Orban argued the following:

[b]ecause section 232 allows the President a virtually unlimited range of options if he concludes, in his unfettered discretion, that imports of an article such as steel threaten to impair the national security, as expansively defined, section 232 lacks the intelligible principle that decisions of the United States Supreme Court have required for a law not to constitute a delegation of legislative authority, which would violate Article I, section 1 of the Constitution.⁵²

AIIS, SimTex, and Orban jointly moved for summary judgment on July 19, 2018.⁵³ Thereafter, the American Iron and Steel Institute, Steel Manufacturers Association, and Basrai Farms, each appeared, *amici curiae*, and filed amicus briefs in opposition to the summary judgment motion.⁵⁴ The CIT heard oral arguments on December 19, 2018.⁵⁵ A ruling is

48. Complaint at 1, *Am. Institution for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 7.

53. Plaintiffs Motion for Summary Judgment at 1, *Severstal Exp. GMBH v. United States*, 39 I.T.R.D. 3084 (Ct. Int'l Trade 2018) (No. 18-00152).

54. Brief for American Iron and Steel Institute and Steel Manufacturers Association as Amici Curiae Opposing Plaintiffs, *Am. Institution for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018); Brief for Basrai Farms as Amicus Curiae Opposing Defendants, *Am. Institution for Int'l Steel v. United States*, No. 18-00152 (Ct. Int'l Trade 2018 argued Dec. 19, 2018).

55. *U.S. Court of International Trade Hears Case on Constitutionality of Section 232 Steel and Aluminum Duties*, BRC (Dec. 19, 2018), <http://www.barnesrichardson.com/?t=40&an=86875&format=xml&p=3731>.

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forthcoming in 2019.⁵⁶ The three-judge panel deciding the case consists of Judge Claire Rita Kelly, Judge Jennifer Choe-Groves, and Judge Gary S. Katzmann.⁵⁷

2. *Countervailing Duty Case*

a. *Zhongce Rubber Group Co. Ltd. v. United States*⁵⁸

Plaintiff Zhongce Rubber Group Company Limited (Zhongce) filed suit pursuant to 28 U.S.C. § 1581(c) (2012), seeking injunction and contesting the application of adverse facts available (AFA)⁵⁹ by Commerce in calculating the rate applied to Zhongce during an administrative review of a countervailing duty (CVD) order on passenger vehicle and light truck tires from the People's Republic of China.⁶⁰ Zhongce argued that Commerce's application of AFA is unsupported by substantial evidence and that the "all others" rate should apply to Zhongce.⁶¹

The United States moved to dismiss the action for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(6).⁶² Specifically, the United States argued Zhongce was not entitled to a statutory injunction because it failed to follow the procedures for obtaining an injunction, and an injunction was not appropriate because Zhongce failed to exhaust its administrative remedies prior to filing suit.⁶³ Zhongce submitted a response in opposition to the motion, arguing that a full briefing on the merits was necessary before the CIT can decide whether Zhongce properly exhausted its administrative remedies and that the CIT's consideration of exhaustion at such stage was premature.⁶⁴

56. *See id.*

57. Chris Gillis, *Trade Court to Review Constitutionality of Steel Tariffs*, AMERICAN SHIPPER (Sep. 24, 2018), <https://www.americanshipper.com/news/?autonumber=72561&source=redirected-from-old-site-link>; *see also Judges of the United States Court of International Trade*, COURT OF INTERNATIONAL TRADE (last visited Jan. 30, 2019), <https://www.cit.uscourts.gov/judges-united-states-court-international-trade> (showing that all three panel judges were appointed to the CIT by President Barack Obama).

58. *Zhongce Rubber Group Co. v. United States*, No. 18–00082, 2018 WL 6118457 (Ct. Int'l Trade Nov. 20, 2018).

59. *Id.* at *1; *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 83 Fed. Reg. 11694, 11695 (U.S. Dep't Commerce Mar. 16, 2018) (final admin. review); *see also* Memorandum from James Maeder, Assoc. Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, to Gary Taverman, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations (March 9, 2018) (public document and on file with the Dept. of Commerce) (regarding *Countervailing Duty Order on Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China*, 83 Fed. Reg. 11694, 11695 (U.S. Dep't Commerce Mar. 16, 2018) (final admin. review)).

60. *Zhongce Rubber Group Co.*, No. 18–00082, 2018 WL at *1.

61. *Id.*

62. *Id.*

63. *Id.* at *2.

64. *Id.*

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The CIT held “Commerce’s regulations require a challenger to Commerce’s [CVD] determinations to submit a case brief to Commerce that must contain all arguments that the challenger deems relevant to the Secretary’s final results, including any arguments presented before the date of publication of the preliminary results.”⁶⁵ The CIT concluded Zhongce failed to exhaust its administrative remedies prior to filing the suit as required and granted the United States’ motion to dismiss.⁶⁶

65. *Id.* (first citing 19 C.F.R. § 351.309(c)(2) (2018); then citing *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)).

66. “Zhongce failed to submit a case brief challenging Commerce’s preliminary results, and instead waited to challenge Commerce’s decision before this court The court concludes that Plaintiff should have exhausted its administrative remedies prior to filing its action, and this case is dismissed.” *Zhongce Rubber Group Co.*, No. 18–00082, 2018 WL at *2–3.

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