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Customs Law

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Customs Law

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Customs Law

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I. Introduction

This article summarizes important developments in 2015 in customs law, including U.S. judicial decisions, trade, legislative, administrative, and executive developments, as well as Canadian, Chilean, and European legal developments.¹

II. U.S. Judicial Nominations and Appointments and Review of Customs-Related Determinations²

A. CHANGES, NOMINATIONS, AND APPOINTMENTS

Judge Restani assumed senior status in 2015 at the U.S. Court of International Trade (CIT).³ President Obama nominated Elizabeth J. Drake (currently a partner in the law firm of Stewart and Stewart), Jennifer Choe Groves (currently Chief Executive Officer of Titanium Law Group LLC and Choe Groves Consulting LLC), Justice Gary Stephen Katzmann (currently serving as an Associate Justice on the Massachusetts Appeals Court),⁴ and renominated Jeanne E. Davidson (currently at the Department of Justice Civil Division as Director of the Offices of Foreign Litigation and the International Legal

* The committee editors of this year in review article were Vincent Draa, Esq., Vice President and General Counsel for Grainger International and Rebecca A. Rodriguez, Esq., Associate Attorney for GrayRobinson, P.A. in Miami, Florida. Section editors and contributors are identified in each section.

1. For developments during 2014, see Jennifer Diaz et al., *Customs Law*, 49 ABA/SILYIR 5 (2015).

2. Section editor: George R. Tuttle, III, Esq. Section Authors: George R. Tuttle, III, Esq.; Luis Arandia, Esq.; Shane Devins, Esq.

3. *History of the Federal Judiciary, Biographical Dictionary of Federal Judges: Restani, Jane A.*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3213&cid=999&ctype=na&instate=na> (last visited Mar. 31, 2016).

4. *President Obama Nominates Three to Serve on the United States Court of International Trade*, THE WHITE HOUSE (July 30, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/30/president-obama-nominates-three-serve-united-states-court-international>.

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Assistance and the International Trade Field Office in the Commercial Litigation Branch) to serve on the court.⁵

President Obama also appointed Kara Fernandez Stoll to the Court of Appeals for the Federal Circuit⁶ to fill the court's only vacancy and, she is the court's twelfth active circuit judge.⁷

B. U.S. COURT OF APPEALS CASES

1. GRK Canada v. United States⁸

The Court of Appeals for the Federal Circuit (CAFC) denied a petition for rehearing en banc by GRK Canada regarding the CAFC's majority opinion in *GRK Canada v. United States*,⁹ which reversed the CIT's ruling on the proper tariff classification of wood screws. In the CAFC panel decision, the Court held that use of subject articles may, under certain circumstances, be considered when the tariff classification is an eo nomine provision.¹⁰ Circuit Judge Wallach and Reyna strongly dissented from the Court's refusal to reconsider the case en banc.

In the dissent, Judge Wallach wrote that the CAFC panel decision "undermines our case law requiring a distinction between use and eo nomine provisions without articulating whether an exception applies in this case, or whether the subheadings at issue should be properly reclassified as use provisions at the beginning of the analysis. Because the majority opinion upends a once-clear analytical framework and will breed confusion in future cases, the concerns raised are "of exceptional importance" and "en banc consideration is necessary to secure or maintain uniformity of the court's decisions."¹¹

2. Belimo Automation AG v. United States¹²

The CAFC affirmed a decision by the CIT regarding the classification of certain imported devices consisting of an electric motor, gears, and two printed circuit boards, which are principally used in heating, ventilating, and air conditioning ("HVAC") systems within buildings as "electric motors" under subheading 8501.10.40, Harmonized Tariff Schedule of the United States ("HTSUS").¹³ Belimo argued that the subject imports should have been classified as "automatic regulating and controlling instruments and apparatus; parts and accessories thereof" under HTSUS 9032.89.60.¹⁴ The CAFC said

5. *Presidential Nominations Sent to the Senate*, THE WHITE HOUSE (Jan. 7, 2015), <https://www.whitehouse.gov/the-press-office/2015/01/07/presidential-nominations-sent-senate>.

6. *History of the Federal Judiciary, Biographical Dictionary of Federal Judges: Stoll, Kara Fernandez*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/servlet/nGetInfo?jid=3592&cid=999&ctype=na&instate=na> (last visited Mar. 31, 2016).

7. *U.S. Circuit Judge Kara F. Stoll Joins the U.S. Court of Appeals for the Federal Circuit*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/announcements/us-circuit-judge-kara-f-stoll-joins-us-court-appeals-federal-circuit> (last visited Mar. 31, 2016).

8. *GRK Canada, Ltd. v. United States*, 773 F.3d 1282 (Fed. Cir. 2014).

9. *GRK Canada, Ltd. v. United States*, 761 F.3d 1354 (Fed. Cir. 2014).

10. *Id.* at 1359.

11. *GRK Canada, Ltd.*, 773 F.3d, at 1289.

12. *Belimo Automation AG v. United States*, 774 F.3d 1362 (Fed. Cir. 2014).

13. *Id.*

14. *Id.* at 1363.

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that the devices are similar to a traditional actuator but represent an improvement in that they incorporate a programmed Application Specific Integrated Circuit (“ASIC”). The ASIC’s purpose is to continuously and independently monitor the damper blade’s position and maintain it at the correct angle without any input from the central controller.

The CIT found that the actuators could not be classified under HTSUS 9032 because they do not automatically measure the actual value of the temperature or any variable of air, as required by HTSUS Chapter 90, Note 7(a). The CAFC concluded that Belimo’s actuators are only designed to monitor motor behavior and not the actual value of a factor of liquids or gases, as required in the note and thus could not be classified under HTSUS Heading 9032. The CAFC found that the classification of Belimo’s products as motors under Heading 8501.10.40 was proper because the ASIC’s functions are complementary to the principal function of an electric motor, and all relate to improving the precision and reliability of the motor’s operation.¹⁵

3. Hartford Fire Insurance Co. v. United States¹⁶

The CAFC affirmed a decision by the CIT to dismiss a surety’s claim that it had the right to avoid its obligations under bonds it posted on behalf of a company that imported freshwater crawfish tailmeat from China. Hartford acted as surety for eight single-entry bonds that covered the estimated antidumping duties on entries of freshwater crawfish tailmeat from Chinese producer Hubei Qianjiang Houhu Frozen (“Hubei”). After Hubei’s new shipper review was rescinded, Customs liquidated the Hubei Entries at the 223.01% country-wide rate in effect pursuant to the final results of the relevant administrative review of the Order.¹⁷ Following the importer’s failure to pay the duties owed after liquidation, Customs demanded payment from Hartford. Hartford did not satisfy the demand and instead filed a complaint at the CIT on February 7, 2007, seeking to void its obligations under the bonds securing the Hubei Entries. Hartford alleged the bonds were voidable because Customs had been investigating Sunline for possible import law violations during the period in which the bonds were secured and the Hubei entries filed, and Customs failed to inform Hartford of the investigation.¹⁸ Hartford alleged that Customs, as obligee on the bonds, abused its discretion by either failing to require a cash deposit in lieu of a bond for the Hubei Entries or by failing to reject the entries altogether. The CIT dismissed the case for failure to state a claim for which relief can be granted.

In affirming the CIT decision, the CAFC said that Hartford failed to plead facts suggesting that the Customs’ investigation had any impact on the importer’s default or increased the risk of default in any fashion. As the CIT noted, Customs acted “in full compliance with the governing statutes and regulations when it accepted the bonds.”¹⁹

15. *Id.* at 1366.

16. *Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281 (Fed. Cir. 2014).

17. *Id.* at 1282.

18. *Id.*

19. *Id.* at 1289.

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4. Best Key Textiles v. United States²⁰

The CAFC vacated and remanded a decision of the U.S. Court of International Trade.²¹ Best Key is a maker, but not importer, of metalized polyester yarns. Best Key sought a ruling from Customs on the tariff classification of metalized yarn. Customs classified the yarn under HTSUS 5605.00.90, which has a rate of duty of 13.2% ad valorem.²² Best Key requested a second ruling from Customs on the tariff classification of a pullover garment (“Johnny Collar”) made of Best Key’s metalized yarn. Best Key argued for a tariff provision of a men’s shirt of other textile materials with a duty rate of 5.6% ad valorem, as opposed to men’s shirts made of polyester, which carries a duty rate of 32% ad valorem.²³ Customs classified the Johnny Collar as a pullover of man-made non-metalized fibers under HTSUS 6110.30.3053. Best Key requested that Customs reconsider the Johnny Collar ruling. In response, Customs reviewed and revoked both the yarn ruling and Johnny Collar ruling. Customs reclassified Best Key’s yarn under HTSUS 5402.47.90 with a duty rate of 8% ad valorem.²⁴ The Johnny Collar classification remained the same.

Best Key challenged the yarn ruling revocation but not the revocation of Johnny Collar ruling before the CIT. Initially, the CIT dismissed the action because Best Key had not established jurisdiction. On rehearing, the CIT reversed its jurisdictional holding and concluded that it had jurisdiction under 28 U.S.C. § 1581(i)(4) which is the residual jurisdiction section’s “administration and enforcement” provision. On the merits, the CIT denied Best Key’s Motion for Judgment on the Agency Record, thereby sustaining the revocation. Best Key appealed.

The CAFC ruled that the CIT erred in reversing itself and “presuming” jurisdiction under § 1581(i)(4). The Government argued that another jurisdictional avenue exists under § 1581(a) for those injured by the Revocation, thereby rendering jurisdiction under the residual provision inappropriate. Best Key, in response, said § 1581(a) is neither available nor adequate because it does not import the yarn. Best Key argued that the remedy it seeks is a reversal of the Revocation of the Yarn Ruling, even though this would result in a higher duty rate on Best Key’s yarn, because the Revocation “caused Best Key’s customers to cancel orders en masse.” The CAFC agreed with the Government’s argument that the proper “avenue of approach” to redress Best Key’s harm is a challenge under § 1581(a). That is, any producer who imports items made from Best Key’s yarn and believes the merchandise should be subject to a lower duty rate should protest the classification and challenge any denial of its protest before the CIT.

C. 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.S.C. § 1581 and 28 U.S.C. § 1582.²⁵ In the

20. Best Key Textiles Co., Ltd. v. United States, 777 F.3d 1356 (Fed. Cir. 2015).

21. Best Key Textiles Co. Ltd. v. United States, 2014 WL 705286 (Ct. Int’l Trade Feb. 25, 2014).

22. Hartford Fire Ins. Co., 772 F.3d at 1358.

23. *Id.*

24. *Best Key Textiles Co., Ltd.*, 777 F.3d at 1359.

25. 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

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context of customs litigation, the two subparagraphs of § 1581 most frequently invoked by litigants are subparagraphs (a)²⁶ and (i).²⁷

D. TARIFF CLASSIFICATION

1. *Am. Fiber & Finishing, Inc. v. United States*²⁸

In this action, American Fiber & Finishing, Inc. (“AFF”) challenged the denial of its protests made pursuant to 19 U.S.C. § 1514, pertaining to a change in classification of imported cotton gauze fabric from duty free to 10.2%. The question before the court was whether a Notice of Action informing AFF of the change could constitute an “interpretive ruling or decision” within the meaning of 19 U.S.C. § 1625(c), requiring CBP to publish notice and comment before implementing the change in classification. The court ultimately concluded that AFF had not offered sufficient evidence to establish that the notice of action was the result of considered deliberation and effectively revoked a treatment, thus constituting an interpretive ruling or decision. Because the court concluded that genuine issues of material fact remained, the cross motions for summary judgment were denied.

2. *Composite Tech Intl. v. United States*²⁹

The court rejected a protest challenge by Composite concerning the tariff classification of its imported plywood by Customs. Customs classified the plywood under 4421.90.97, as “Other articles of wood: Other: Other” (at 3.3%).³⁰ Composite claimed the product was properly classified under 4412.99.51 “Plywood, veneered panels and similar laminated wood: Other: Other: With at least one outer ply of non-coniferous wood: Other: Other:” (duty free).³¹ Composite contended that the merchandise fit within the common meaning of “veneered panels” provided by lexicographical sources and supported by the Explanatory Notes. The court, however, disagreed because the panels involved in the imported products were in excess of 6 millimeters thick and therefore, were not “veneering sheets” as defined under HTSUS 4408. The court looked to this provision

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 (2015).

26. 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 (2015).

27. Section 1581(i), provides 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. 28 U.S.C. § 1581 (2015).

28. *Am. Fiber & Finishing, Inc. v. United States*, 121 F. Supp.3d 1273, Slip Op. 2015-1117 (Ct. Int’l Trade Oct. 21, 2015).

29. *Composite Tech. Int’l, Inc. v. United States*, 106 F.Supp.3d 1337, Slip Op. 2015-1115 (Ct. Int’l Trade Sept. 28, 2015) (appeal filed by Composite Tech. v. US, Fed. Cir., Nov. 25, 2015).

30. *Id.* at 1339.

31. *Id.*

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because 4412 did not define the term “thin” veneer. Thus, concluded the court, the only remaining heading under which the merchandise could be classified was “Other articles of wood,” as directed by Customs.

3. *Digidesign Inc. v. United States*³²

Digidesign challenged the classification by CBP of factory consoles that work with computers to manipulate music in digital format on a host computer’s hard drive as: “electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof: Other machines and apparatus: Other: Other: Other: Other” under 8543.89.96 (2.6%). Digidesign claimed that the consoles were properly classified as units of automatic data processing machines under Heading 8471 (duty free). No recording, editing or mixing occurs on the units themselves. In rejecting Digidesign’s claim, the court focused on the language of Chapter 84, Note 5(E), which requires machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine be classified in the heading appropriate to their respective functions or, failing that, in a residual heading. Applying Note 5(E), the court found that the consoles performed only non-data processing functions. Next, the court considered whether the consoles “work[ed] in conjunction with an automatic data processing machine.”³³ Noting that the HTSUS does not specifically define the phrase “working in conjunction,” the court looked to dictionary definitions of the phrase, and found it to be “functioning or operating in a specified manner while joined together for a common purpose.”³⁴ The court found the imported products worked in conjunction with an ADP machine (i.e., the host computer). From this the court determined that the consoles are precluded from classification under HTSUS Heading 8471 by operation of Chapter 84, Note 5(E). Further, because no specific heading governs the functions provided by the consoles, the court affirmed CBP’s classification under the residual heading 8543.

4. *G.G. Marck & Assocs. v. United States*³⁵

The action concerned the tariff classification of cups and mugs that were imported together. Customs classified the mugs as “mugs and other steins” under 6912.00.44 (10%) and the cups as “Other” under 6912.00.48 (9.8%).³⁶ G.G. Marck claimed the products were properly classified under 6912.00.39 as Tableware and kitchenware “Available in specified sets: In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is over \$38.”³⁷ The issue, noted the court was whether the cups and mugs were “[a]vailable in specified sets” as defined by Chapter Note 6(a) and “in the same pattern” as required by Chapter Note 6(a), which the court found to mean “coordinate in shape, color and decoration, and were designed to be used

32. *Digidesign, Inc. v. United States*, 44 F.Supp.3d 1366 (Ct. Int’l Trade Jan. 22, 2015).

33. *Id.* at 1374.

34. *Digidesign, Inc.*, 44 F.Supp.3d at 1375.

35. *G.G. Marck & Assocs. v. United States*, 2015 WL 3757040 (Ct. Int’l Trade June 17, 2015).

36. *Id.* at 2.

37. *Id.*

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as a set.”³⁸ Thus, noted the court, to be classified under subheading 6912.00.39, the merchandise must be of a single pattern and each of the specified pieces must be sold or offered for sale in that pattern. Following a detailed factual inquiry and expert testimony, the court found that some of the articles are in specified sets and some are not, and classified the various cups and mugs accordingly.

5. *Infantino v. United States*³⁹

At issue in this case is the proper tariff classification of merchandise sold under the name Shop & Play® Funny Farmer (“Funny Farmer” or “merchandise”) imported by Plaintiff Infantino, LLC (“Infantino”). The articles consisted of play mats for children, which can be used both as a normal play mat and inside of a shopping cart. At liquidation, Customs classified the mats under 9404.90.20 (6%) for “mattress supports; articles of bedding . . .” and Infantino claimed that the mats were properly classifiable under subheading 9503.00.0080 (duty free) as “other toys . . .” The court stated the item was *prima facie* classifiable under both, so the court applied GRI 3 and discussed essential character. The court found the item’s essential character was to be imparted by its toy components and that it was packaged and priced as a toy. Accordingly, the court agreed with Infantino and classified it as a toy and duty free.

E. MISCELLANEOUS CASES 28 U.S.C. § 1581(A) AND (I)

1. *JBLU, Inc. v. United States*⁴⁰ (*Country of Origin*)

Plaintiff, JBLU, Inc., protested “Notices to Mark and/or Redeliver” issued by CBP for jeans exported from China and entered into the port of Los Angeles.⁴¹ “Customs issued the ‘Notices to Mark and/or Redeliver’ . . . stating that jeans were not legally marked with ‘Country of Origin’ because a ‘Country of Origin’ marking was not in ‘close proximity’ to references ‘USA’ and ‘Los Angeles’ on the name of the jeans, contrary to 19 C.F.R. § 134.46.⁴² The markings on the jeans included ‘C’est toi Jeans Los Angeles,’ ‘CT Jeans USA,’ and ‘C’est Toi Jeans USA.’⁴³ All three of which were trademarked.⁴⁴ JBLU claimed the less stringent “Country of Origin” marking requirements of 19 C.F.R. § 134.47 applied instead of 19 C.F.R. § 134.46 because of the trademarks.⁴⁵ Customs responded that the goods were imported before submission of the trademark applications.⁴⁶ Customs agreed that any jeans imported after applications were filed with USPTO were legally marked.⁴⁷ The court found that because 19 C.F.R. § 134.47 is silent as to definition of “trademark,” it must give deference to Customs’ interpretation of the

38. *Id.* at 8.

39. *Infantino, LLC v. United States*, 2014 WL 7331753 (Ct. Int’l Trade Dec. 24, 2014).

40. *JBLU, Inc. v. United States*, 44 F. Supp. 3d 1391 (Ct. Int’l Trade 2015).

41. *Id.* at 1393.

42. *Id.* at 1393, 1398.

43. *Id.* at 1393.

44. *JBLU, Inc.*, 44 F. Supp. 3d at 1391.

45. *Id.* at 1396.

46. *Id.* at 1393.

47. *Id.*

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regulation.⁴⁸ The court then found Customs' interpretation of the regulation to mean registered trademarks or marks subject to a pending application to be reasonable and consistently applied and concluded that Customs' "Notices to Mark and/or Redeliver" were properly issued.⁴⁹

2. Ford Motor Co. v. United States⁵⁰ (*Drawback*)

Ford challenged a CBP determination that seventeen drawback claims filed prior to December 3, 2014, were not deemed liquidated pursuant to 19 U.S.C. § 1504(a)(2), as enacted in December 2004, to provide for the deemed liquidation of old drawback claims.⁵¹ Under subparagraph (C) of 19 U.S.C. § 1504(a)(2), all drawback claims filed before December 3, 2005 (the effective date of the statute), and to which liquidation was not final as of that date, were deemed liquidated on the one-year anniversary of enactment at the amounts asserted by the claimants in the respective drawback entries and claims.⁵²

The court rejected CBP's position that, notwithstanding the language of subparagraph (C), drawback claims that were filed before December 3, 2004, and which remained unliquidated one year later, were not deemed liquidated pursuant to subparagraph (C) if any of the import entries underlying the drawback claims were not yet liquidated and those liquidations were final as of December 3, 2005.⁵³ In other words, Customs read subparagraph (C) as a restrictive condition which appears nowhere in the language of that provision.

The court ruled that Customs did not have legal authority to review, liquidate, or take any other action with respect to Ford's seventeen drawback claims other than to recognize the status of those drawback claims as deemed liquidated as of December 3, 2005, at the amounts claimed by Ford.

3. Int'l Fresh Trade Corp. v. United States⁵⁴ (*Bonds*)

International Fresh Trade Corp. ("IFTC") moved to enjoin CBP from imposing the "single transaction bond requirement on [IFTC]'s entries of fresh garlic from China", which were subject to an antidumping order.⁵⁵ Helpful details, which are gleaned directly from the decision, indicate that IFTC imported from an exporter "who was granted a combination rate with its producer."⁵⁶ However, due to discrepant information CBP requested "further documentation to verify the identity of the producer and shipper of the entries."⁵⁷ "The documents indicated that [the Chinese producer] had undergone changes, including restructuring, that potentially rendered it a different entity and ineligible for the combination rate."⁵⁸ Because of this uncertainty CBP "denied entry

48. *Id.* at 1395.

49. *Id.* at 1396.

50. Ford Motor Co. v. United States, 44 F. Supp. 3d 1330 (Ct. Int'l Trade 2015).

51. *Id.* at 1339.

52. *Id.* at 1342.

53. *Id.* at 1348-49.

54. Int'l Fresh Trade Corp. v. United States, 26 F. Supp. 3d 1363 (Ct. Int'l Trade 2014).

55. *Id.* at 1365.

56. *Id.*

57. *Id.* at 1366.

58. *Id.*

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until IFTC posted additional bonding to make its cash deposit rate commensurate with its potential antidumping duty liability.⁵⁹

The court denied IFTC's motion for a preliminary injunction because IFTC could not demonstrate a clear threat of irreparable harm.⁶⁰ IFTC did not provide financial documents nor did it utilize the available and appropriate remedy, which was the Department of Commerce's changed circumstances review, or a likelihood of success on the merits that CBP could not make substantive determinations under the antidumping duty laws.⁶¹

4. *Ovan Int'l & Carriage House v. United States*⁶² (*Standing/ Protest Sufficiency*)

Carriage House is the owner of a 1958 Rolls Royce Silver Cloud car.⁶³ Carriage exported the vehicle "to the United Kingdom in March 2012 to be sold by auction."⁶⁴ The vehicle "did not sell at auction and was returned to Carriage House" by the auction house using Ovan as the Importer of Record and Customs Broker.⁶⁵ At the time of entry, Ovan claimed the entry should be duty free under HTSUS 9801.00.25.⁶⁶ Customs issued a Notice of Action stating that the vehicle did not qualify for duty-free treatment and would be classified under HTSUS 8703.23.00 (2.5% duty) at liquidation.⁶⁷ Carriage House filed a protest 189 days after liquidation.⁶⁸ Customs denied the protest as untimely filed. Ovan paid \$23,647.70 in duties and filed the CIT complaint.⁶⁹

Analyzing 28 U.S.C. § 2631(a), the court ruled that Ovan did not have standing to bring the action as only a person who filed the protest nor as "a surety on the transaction which is the subject of the protest."⁷⁰ Neither may bring a civil action to contest the denial of a protest.⁷¹ Ovan did not file the protest nor serve as surety on the transaction.⁷² The Court dismissed Ovan as a plaintiff from the case.⁷³ The Court then dismissed the case for lack of subject matter jurisdiction because the remaining plaintiff, Carriage House, failed to meet the jurisdictional requirement of filing a valid timely protest.⁷⁴ The Court dismissed Carriage House's claims that an affidavit filed forty-six days after liquidation was a valid protest because it failed to meet all of the statutory and regulatory requirements for validity.⁷⁵ The court reasoned that the purported protest was not on a

59. *Id.*

60. *Int'l Fresh Trade Corp. v. United States*, 26 F. Supp. 3d 1363, 1368 (Ct. Int'l Trade 2014).

61. *Id.*

62. *Ovan Int'l, Ltd. v. United States*, 49 F. Supp. 3d 1327 (Ct. Int'l Trade 2015).

63. *Id.* at 1329.

64. *Id.*

65. *Id.*

66. *Id.* at 1329-30.

67. *Id.* at 1330.

68. *Ovan Int'l, Ltd. v. United States*, 49 F. Supp. 3d 1327, 1330 (Ct. Int'l Trade 2015).

69. *Id.*

70. *Id.* at 1330-31.

71. *Id.*

72. *Id.* at 1331.

73. *Ovan Int'l, Ltd. v. United States*, 49 F. Supp. 3d 1327, 1331 (Ct. Int'l Trade 2015).

74. *Id.* at 1337.

75. *Id.* at 1333, 1335.

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Customs standard protest Form 19, it was not clearly labeled “protest,” and it did not list the liquidation date of the subject entry.⁷⁶

5. *Hutchison Quality Furniture, Inc. v. United States*⁷⁷ (*Subject Matter Jurisdiction*)

Plaintiff, Hutchison Quality Furniture, is an importer of wooden bedroom furniture manufactured in China.⁷⁸ “Hutchison’s entries were subject to the third administrative review of an antidumping order on wooden bedroom furniture from China.⁷⁹ This administrative review covered furniture entries made in 2007.”⁸⁰ Chinese exporters fought the results of the review, but they eventually cleared in February 2013.⁸¹ CBP liquidated the imported furniture in September 2013 at a rate of 83.55 percent for Hutchison’s Chinese exporter.⁸² The decision was unsuccessfully protested by Hutchison. CBP denied Hutchison’s protests arguing that the entries it imported “were deemed liquidated six months” before the February 2013 in the CIT opinion.⁸³

Hutchison challenged the validity of Commerce’s liquidation instructions under 28 U.S.C. § 1581(i), the CIT’s residual jurisdiction, thus avoiding the pre-payment requirement under a denial of a protest claim.⁸⁴ The court, however, stated that “[t]he true nature of [Hutchison’s] claims involved a protestable CBP decision regarding liquidation and/or deemed liquidation, and therefore, § 1581(a) jurisdiction would not have been manifestly inadequate.”⁸⁵ Hutchison could have filed a protest “claiming that the entries had already been deemed liquidated by operation of law.”⁸⁶ Plaintiff did not allege these grounds in the protest it filed with CBP.⁸⁷ Thus, the court dismissed Hutchison’s claim “for lack of jurisdiction because a remedy under § 1581(a) would not have been manifestly inadequate.”⁸⁸

6. *Shah Bros, Inc. v. United States*⁸⁹ (*Attorneys’ Fees*)

As a result of previous litigation, Shah Bros, Inc. was awarded “compensation for attorneys’ fees and expenses it had reasonably incurred” pursuant to the Equal Access to Justice Act.⁹⁰ Shah Bros brought an action for “a supplemental award of the additional attorneys’ fees it incurred while litigating its EAJA application.”⁹¹ The court granted the supplemental award, in part, as “Plaintiff was entitled to recover attorneys’ fees for work

76. *Id.*

77. *Hutchison Quality Furniture, Inc. v. United States*, 71 F.Supp.3d 1375 (Ct. Int’l Trade 2015).

78. *Id.* at 1377.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Hutchison Quality Furniture, Inc. v. United States*, 71 F.Supp.3d 1375, 1377 (Ct. Int’l Trade 2015).

84. *Id.* at 1378.

85. *Id.*

86. *Id.* at 1379.

87. *Id.*

88. *Id.*

89. *Shah Bros., Inc. v. United States*, 32 F. Supp. 3d 1348 (Ct. Int’l Trade 2014).

90. *Id.* at 1350.

91. *Id.*

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reasonably expended to obtain the amount previously awarded.”⁹² But the Court reduced the supplemental award “to reflect excess hours and to the extent of Plaintiff’s success in the [original] fee litigation.”⁹³

D. CIVIL PENALTY CASES (28 U.S.C. § 1582)

1. United States v. Freight Forwarder Int’l, Inc.⁹⁴

The United States brought an action pursuant to 28 U.S.C. § 1582(1) to recover a civil penalty against Freight Forwarder International, Inc. (“FFI”) for violations of 19 U.S.C. § 1641(b)(6) and 19 C.F.R. § 111.4 for “transacting customs business without a broker’s license.”⁹⁵ While FFI had an employee that was a licensed customs broker, it did not possess a corporate broker license.⁹⁶ The CIT granted the government’s motion for default judgment as FFI failed to answer or otherwise respond to the complaint.⁹⁷

2. United States v. NYCC 1959 Inc.⁹⁸

The United States brought an action to recover a civil penalty under 19 U.S.C. § 1592 against NYCC 1959 Inc. (“NYCC”) for negligently attempting to enter merchandise, which were “candles from the People’s Republic of China.”⁹⁹ NYCC failed to appear.¹⁰⁰ Because the “complaint and supporting evidence adequately established liability of the defendant for a grossly negligent violation of Section 592 as a matter of law”, and because the claim was for a civil penalty amount within the statutory limit for such violations, the CIT granted the United States’ motion for default judgment against NYCC in the amount of “\$15,310.08 plus post-judgment interest.”¹⁰¹

3. United States v. CTS Holding, LLC¹⁰²

CTS Holding, LLC (“CTS”) moved for summary judgment against the United States “in a duty recovery and penalty action.”¹⁰³ CTS contended that the CIT lacked subject matter jurisdiction over the penalty claim because CBP “did not perfect its claim at the administrative level,” and that the U.S. “may not seek recovery from it as a ‘successor-in-interest’ to TJ Ceramic Tile & Sales Import, Inc. (“TJ”), the importer of the subject merchandise.”¹⁰⁴ The CIT denied the motion by CTS because the United States “complied with the procedural requirements of § 1592(b) and [CTS] had notice that the

92. *Id.*

93. *Id.*

94. United States v. Freight Forwarder Int’l, Inc., 44 F. Supp. 3d 1359 (Ct. Int’l Trade 2015).

95. *Id.* at 1360.

96. *Id.* at 1361.

97. *Id.* at 1362.

98. United States v. NYCC 1959 Inc., 79 F. Supp. 3d 1343 (Ct. Int’l Trade 2015).

99. *Id.* at 1344-45.

100. *Id.* at 1345.

101. *Id.* at 1345, 1350.

102. United States v. CTS Holding, 2015 Ct. Intl. Trade LEXIS 71, (Ct. Int’l Trade June 30, 2015).

103. *Id.* at *1.

104. *Id.*

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penalty claim” asserted negligence.¹⁰⁵ On the question of successorship liability, the CIT cited cases which “held corporate successors may be held liable for their predecessors’ actions in duty recovery and penalty actions,” construing the word “person” to “include corporations and their successors and assigns,” noting that common law allows successor liability where the successor appeared to be a “mere continuation or reincarnation of the old corporation.”¹⁰⁶ The CIT, however, found there were “genuine issues of material fact as to whether CTS was a mere continuation of TJ, and, thereby, liable for TJ’s actions” and denied CTS’s motion for summary judgment.¹⁰⁷

III. Canadian Legal Developments¹⁰⁸

A. FREE TRADE

This year, Canada and eleven other countries signed the most ambitious economic and free trade agreement in history, namely, the Trans Pacific Partnership (“TPP”). TPP countries represent almost 800 million people and an economy of approximately \$27 trillion; forty percent of global gross domestic product (“GDP”).¹⁰⁹ The TPP is designed to eliminate or reduce tariffs (particularly in Malaysia and Vietnam) and non-tariff barriers.¹¹⁰ It is also designed to provide market access to Japan.¹¹¹ Some sectors in Canada have not been TPP supporters. Under the TPP Canada will provide new market access to 3.5 percent of the dairy industry.¹¹² Dairy producers have opposed any weakening of Canada’s supply management system, which involves the imposition of punitive tariffs on dairy products imported in the absence of a permit.¹¹³ Concerns have also been voiced in the auto sector. The TPP will lower the regional value content requirements for imported autos and parts. Union representatives have argued that the TPP will facilitate the importation of Japanese cars made with large amounts of Chinese parts.¹¹⁴ It has been suggested that the TPP will facilitate the importation of cheaper autos and parts and undermine the rationale for maintaining Japanese-owned auto plants in Ontario. The ratification process will likely take at least one year, and it is uncertain whether the TPP will be ratified by all twelve countries.

105. *Id.* at *1, 24.

106. *Id.* at *28-32.

107. *Id.* at *34.

108. Section Editor: Greg Kanargdelis, Esq. ; Section Authors: Greg Kanargdelis, Esq., Daniel L. Kiselbach, Esq.

109. Brock R. Williams, Cong. Research Serv., R42344, Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis (2013).

110. *Id.*

111. *See id.*

112. *See id.*; *see also* Owen Lippert, The Perfect Food in a Perfect Mess: The Cost of Milk in Canada, 52 Pub. Policy Sources 2001.

113. *See id.*

114. *See* William H. Cooper, Cong. Research Serv., R42676, Japan Join the Trans-Pacific Partnership: What Are the Implications? (2013).

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B. VALUATION

In January 2015, the Canadian Border Services Agency (“CBSA”) issued Customs Notice 15-0001 titled: *Treatment of Downward Price Adjustments in Value for Duty Calculations*.¹¹⁵ This Customs Notice was issued as a result of the 2014 Canadian International Trade Tribunal (“CITT”) decision in *Hudson’s Bay Company v. President of the Canada Border Services Agency*.¹¹⁶ In *Hudson’s Bay*, the CITT held that the importer was entitled to make a downward price adjustment of the value for duty of goods in specific circumstances.¹¹⁷ It indicated that a post-importation downwards adjustment is appropriate for discounts paid to the importer after importation if, and only if: (1) the discounts were the result of an agreement to reduce the price; and (2) that agreement was in effect at the time the subject goods were imported into Canada.¹¹⁸ The Customs Notice represented a significant departure from the CBSA’s longstanding policy to refuse to recognize downward post-importation adjustments to the price paid or payable and stated that where an agreement to make a post-importation price reduction was effective at the time of importation, and conditions were met for the post-importation price reduction to occur (providing reason to believe that an original value declaration is incorrect), the importer must adjust the value for duty of the goods, pursuant to section 32.2 of the Customs Act.¹¹⁹ An importer must also account for downward post-importation adjustments that were of a non-revenue nature (i.e. duty-free goods), pursuant to section 32.2 of the Customs Act.¹²⁰ If applicable, an importer may claim a refund of duties, pursuant to paragraph 74(1)(e) of the Customs Act.¹²¹

C. SELECTED CITT JURISPRUDENCE

1. DeRonde Tire Supply – *NAFTA Origin Based on “Own Knowledge”*

DeRonde Tire Supply, Inc. v. President of the Canada Border Services Agency is the first decision in which the CITT considered what is required for an exporter—who is not the manufacturer of the exported goods—to certify that goods originate in the NAFTA territory on the basis of the exporter’s “personal knowledge.”¹²² The decision is significant not only because it is the first occasion the CITT has had to deal with the issue, but also because of the manner in which the CITT rejected the arguments of the CBSA, which seemed determined to tie all claims to know that goods originate to information obtained from the manufacturer. In soundly rejecting this restrictive position, the CITT acknowledged that there are many potential roads to supporting a NAFTA origin claim based on personal knowledge.¹²³

115. Canada Border Services Agency, Customs Notice 15-001, “Treatment of Downward Price Adjustments in Value for Duty Calculations”, Jan. 19, 2015.

116. *Hudson’s Bay Company v. President of the Can. Border Servs. Agency*, [2014] C.I.T.T. (Can.).

117. *Id.* ¶¶ 18, 189.

118. *Id.* ¶ 62.

119. *Customs Act*, R.S.C., 1985, c.1 (2nd Supp.) (Can.).

120. *See Hudson’s Bay*, ¶¶ 3, 20, 74.

121. *See id.*, ¶¶ 3, 19, 74.

122. *DeRonde Tire Supply Inc. v. President of the Can. Border Servs. Agency*, [2015] C.I.T.T. (Can.).

123. *Id.* ¶ 43.

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2. *Stylus Sofas – Latest Decision Clarifying Goods Used for “Domestic Purposes”*

Imported furniture is an example of a good that is dutiable if the good is used “for domestic purposes,” but duty-free if used for “other than domestic purposes.” In a series of appeals, the CBSA has sought to extend the concept of “domestic” outside of the household. In *Stylus Sofas* the CBSA argued that a hotel is a “home away from home,” and that hotels are “domestic environments” due to the fact that they are places people go to sleep.¹²⁴ The CITT sided with Stylus Sofas, holding that there is a conceptual connection between a “domestic setting” and a house or household.¹²⁵ But while hotels may be places where individuals and families go to sleep, the CITT could not look beyond the fact that hotels are, in reality, businesses rather than households or homes.¹²⁶ Having held that furniture intended for use in a hotel was not *ipso facto* intended for domestic purposes, the CITT then considered whether Stylus Sofa’s had discharged its burden of establishing that the imported furniture was intended primarily for use in hotels, as opposed to in domestic settings.¹²⁷ In this regard, the CITT considered evidence that the furniture was constructed to a degree of durability exceeding what would be expected from furniture used in a home, as well as evidence that Stylus Sofas had marketed the furniture directly to hospitality clients.¹²⁸ The CITT was satisfied that Stylus Sofas had met its burden of establishing that the CBSA had incorrectly classified the goods and allowed the appeal.¹²⁹

3. *Bri-Chem – CITT Reprimands CBSA for Failing to Follow CITT Decisions*

Bri-Chem Supply Ltd. v. President of the Canada Border Services Agency concerned whether an importer may file correcting entries pursuant to subsection 32.2 of the Customs Act to correct an error in tariff classification and at the same time claim NAFTA origin treatment.¹³⁰ The original import entries were not subject to duty on the basis of an erroneous tariff classification coupled with a NAFTA origin claim.¹³¹

The CBSA rejected Bri-Chem’s corrections, resulting in Bri-Chem’s appeal to the CITT.¹³² The CBSA argued that the CITT did not have the jurisdiction to hear Bri-Chem’s claims on the grounds that the B2 rejected notifications issued to the Bri-Chem did not constitute “decisions” that could be appealed to the CITT pursuant to section 67 of the Customs Act.¹³³ The CITT rejected this argument, citing two earlier decisions in *C.B. Powell*¹³⁴ and *Fritolay*.¹³⁵ The CITT found it significant that Bri-Chem had always claimed that the goods were of U.S. origin, and thus that it was only the tariff

124. *Stylus Sofas Inc. v. President of the Can. Border Servs. Agency*, [2015] C.I.T.T. (Can.).

125. *Id.* ¶ 56.

126. *Id.* ¶ 61.

127. *Id.* ¶ 62.

128. *Id.* ¶ 78.

129. *Id.* ¶ 91.

130. *Bri-Chem Supply Ltd. v. President of the Can. Border Servs. Agency*, [2014] C.I.T.T. (Can.).

131. *Id.* ¶¶ 2, 40.

132. *Id.* ¶¶ 26, 27.

133. *Id.* ¶ 27.

134. *C.B. Powell Ltd. v. President of Can. Border Servs. Agency*, [2010] C.I.T.T. (Can.).

135. *Frito-Lay Canada, Inc. v. President of the Can. Border Servs. Agency*, [2012] C.I.T.T. (Can.).

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classification, and not the declared origin, of the goods that was being corrected.¹³⁶ The deadline contained in section 74 of the Customs Act was held to be irrelevant, as it pertained to refunds of monies paid, and Bri-Chem, according to the CITT, was never in a refund position.¹³⁷ In addition to rejecting the CBSA's substantive and jurisdictional arguments, the CITT also criticized the CBSA for essentially ignoring the CITT's prior decision in *Frito-Lay Canada, Inc. v. President of the Canada Border Services Agency* and attempting to use the Bri-Chem appeal to retry the case.¹³⁸ The CITT allowed the appeal, and in chastising the CBSA for engaging in an abuse of process, the CITT went so far as to say that it "regrets that it lacks the power to award costs in such circumstances."¹³⁹

IV. European Union Legal Developments¹⁴⁰

A. UNION CUSTOMS CODE

Beginning May 1, 2016, the Union Customs Code (UCC)¹⁴¹ will replace the Community Customs Code (CCC)¹⁴² as the new customs framework regulation for the European Union (EU) customs rules and procedures. The UCC aims to improve the existing EU customs framework by simplifying customs procedures while offering greater legal certainty to trade as well as improved procedural clarity for customs officials.¹⁴³ All electronic systems required by the UCC must be implemented by December 31, 2020, thus ensuring a fully electronic customs environment by that date.¹⁴⁴ The UCC also reinforces expedited customs procedures for Authorized Economic Operators (AEO).¹⁴⁵

The UCC substantial provisions will come into force only after the Implementing Act¹⁴⁶ and Delegated Act¹⁴⁷ are in force.¹⁴⁸ Until May 1, 2016, the CCC and its implementing provisions continue to apply.

136. *Id.*

137. *Id.* ¶ 22.

138. *Id.* ¶ 28.

139. *Id.* ¶ 4.

140. Section Editor/Author: Ruta Riley, Redondo Beach, California.

141. 2013 O.J. (L 952) 269, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:269:0001:0101:EN:PDF> (last visited Nov. 15, 2015).

142. 2008 O.J. (L 450) 145, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:145:0001:0064:EN:PDF> (last visited Nov. 15, 2015).

143. See The European Commission, *The Union Customs Code: a recast of the Modernised Customs Code*, available at http://ec.europa.eu/taxation_customs/customs/customs_code/union_customs_code/index_en.htm (last visited Nov. 15, 2015).

144. *Id.*

145. *Id.*

146. Consolidated preliminary draft of the Union Customs Code Implementing Act, TAXUD/UCC-IA/2014-1, available at http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_code/ucc_implementing_act_2014.pdf (last visited Nov. 15, 2015).

147. Commission Regulation, 5195/F1, available at <http://ec.europa.eu/transparency/regdoc/rep/3/2015/EN/3-2015-5195-EN-F1-1.PDF>. (the Delegated Act was adopted by the European Commission on July 28, 2015).

148. See *The Union Customs Code*, *supra* note 141. (no objections have been expressed to the Delegated Act by either the European Parliament or the Council within the permitted objection period. Consequently, the Implementing Act is expected to be presented for the Customs Code Committee's vote before 2016).

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B. FREE TRADE AGREEMENTS (“FTAs”) AND NEGOTIATIONS¹⁴⁹

1. *EU Trade Strategy*

The EU’s current trade strategy focuses on a transparent trade negotiations process, removal of non-tariff barriers, and trade liberalization.¹⁵⁰ The European Commission (the “Commission”) lists the Transatlantic Trade and Investment Partnership (“TTIP”), the Japan FTA, and the China investment agreement among the top FTA priorities.¹⁵¹ The Commission also expressed its interest in modernizing the FTAs with Mexico and Chile and in continuing negotiations for a comprehensive FTA with Mercosur.¹⁵²

2. *EU-Ecuador Trade Agreement*¹⁵³

On September 23, 2014, the Commission released¹⁵⁴ the text of the trade agreement between the EU and Ecuador, which provides for Ecuador joining the EU’s existing agreement with Colombia and Peru.¹⁵⁵ The agreement will improve access for key EU exports (automotive and alcoholic beverages) and Ecuador exports (fisheries, bananas, cut flowers, coffee, and cocoa). The agreement is undergoing legal text revisions before being submitted for ratification.

3. *EU-Canada Trade Agreement (CETA)*¹⁵⁶

The CETA, signed September 26, 2014,¹⁵⁷ is the most comprehensive of the EU’s FTAs to date.¹⁵⁸ Among other things, CETA removes 99% of customs duties, liberalizes trade in services, promotes and protects investments, and provides for protections against unauthorized copying of EU innovations and traditional products.¹⁵⁹ The Commission intends to submit the Agreement to the European Council (the “Council”) and then to the European Parliament (the “Parliament”) for approval in early 2016.¹⁶⁰

149. The list of 2015 EU trade agreements presented in this section is not all-inclusive.

150. See generally The European Commission, *Trade for all – Towards a more responsible trade and investment policy*, available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf (last visited Nov. 15, 2015) [hereinafter “Trade for all”].

151. See *id.* at 5.

152. *Id.* at 33. Mercosur signatories are Argentina, Brazil, Paraguay, Uruguay, and Venezuela.

153. Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part, available at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153147.%20Textual%20Amendments.pdf (last visited Nov. 15, 2015).

154. *EU and Ecuador publish text of trade agreement*, THE EUROPEAN COMM’N, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1156> (last visited Nov. 15, 2015).

155. Trade Agreement between the European Union and its Member States, of the one part, and Colombia, Peru and Ecuador, of the other part, *supra* note 153, ¶ 2.

156. Comprehensive Economic and Trade Agreement (CETA), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (last visited Nov. 15, 2015).

157. *Countries and Regions: Canada*, THE EUROPEAN COMM’N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/canada/> (last updated Mar. 31, 2016).

158. *Trade for all*, *supra* note 150 at 30.

159. See *Comprehensive Economic and Trade Agreement (CETA)*, THE EUROPEAN COMM’N, available at <http://ec.europa.eu/trade/policy/in-focus/ceta/> (last visited Nov. 15, 2015).

160. *Trade for all*, *supra* note 150 at 31.

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4. *EU-Vietnam FTA*¹⁶¹

On August 4, 2015, the EU and Vietnam reached an agreement in principle for an FTA.¹⁶² The legal text of the agreement still needs to be finalized and then approved by the Council and the Parliament.¹⁶³ In addition to eliminating nearly all tariffs on goods traded between the two economies, Vietnam also agreed to remove practically all export duties.¹⁶⁴

5. *WTO Trade Facilitation Agreement (TFA)*¹⁶⁵

On October 5, 2015, the EU ratified the World Trade Organization (“WTO”) Trade Facilitation Agreement (“TFA”).¹⁶⁶ The agreement affects all WTO members and is expected to simplify customs procedures.¹⁶⁷ The TFA contains provisions for expedited movement, release and clearance of goods (including goods in transit); provides for special and differential treatment to developing and least-developed countries with respect to implementation of the Agreement’s individual provisions; and establishes a permanent committee on trade facilitation at the WTO while requiring members to create a national committee to facilitate domestic coordination and implementation of the Agreement.¹⁶⁸

6. *Transatlantic Trade and Investment Partnership (TTIP)*¹⁶⁹

As of November 15, 2015, eleven rounds of negotiations on the comprehensive EU-US trade and investment agreement have been completed.¹⁷⁰ At this stage, the EU and the US have made substantial progress on market access, tariffs, services, and public procurement.¹⁷¹ A second tariff offer and proposals on product-specific rules of origin have been exchanged.¹⁷² The next round is expected to take place in February of 2016.¹⁷³

161. *EU and Vietnam Reach Agreement on Free Trade Deal*, THE EUROPEAN COMM’N, (Aug. 4 2015), available at http://europa.eu/rapid/press-release_IP-15-5467_en.htm.

162. *Id.*

163. *Id.*

164. *Id.*

165. *WTO Agreement on Trade Facilitation*, WT/L/931 (Jul. 15, 2014), available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/L/931.pdf> (last visited Nov. 15, 2015).

166. *The EU Ratifies WTO Trade Facilitation Agreement*, THE EUROPEAN COMM’N, (Oct. 5, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1374>.

167. *Id.*

168. See WTO, *Trade Facilitation*, available at https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (last visited Nov. 15, 2015).

169. *Report of the Eleventh Round of Negotiations for the Transatlantic Trade and Investment Partnership*, THE EUROPEAN COMMISSION, available at http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153935.pdf (last visited Nov. 15, 2015).

170. *11th round of TTIP talks brought progress in most areas of the negotiations*, THE EUROPEAN COMM’N, (Oct. 23, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1389>.

171. *Id.*

172. *Id.*

173. *Id.*

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7. *EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA)*¹⁷⁴

The EU-Ukraine DCFTA provisions will take effect beginning January 1, 2016.¹⁷⁵ According to the Commission, the agreement is expected to aid Ukraine in modernizing its trade relations by opening its markets via progressive removal of customs tariffs and quotas, and by harmonization of laws and regulations in various trade-related areas in order to create the conditions for aligning the Ukrainian economy with EU standards.¹⁷⁶

C. COMBINED NOMENCLATURE EXPLANATORY NOTES

On March 4, 2015, the EU published a revised version of the EU Combined Nomenclature Explanatory Notes (“CNENs”) that replaced the 2011 version of CNENs.¹⁷⁷

D. THE CONTROL LIST OF DUAL-USE ITEMS¹⁷⁸

On October 12, 2015,¹⁷⁹ the Commission adopted the Commission Delegated Regulation,¹⁸⁰ amending Council Regulation (EC) No 428/2009¹⁸¹ and setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, and updating of the EU list of dual-use items.¹⁸²

The update¹⁸³ incorporates approximately 400 changes to the export controls, including changes to technical parameters for nuclear reactor parts and components; new controls on certain chemicals, as well as new controls on special materials; electronics and computers; telecommunications and information security equipment; sensors and lasers; and aerospace and propulsion items.¹⁸⁴ The update also removes from the list certain items and technologies that have become more widely available and represent a lower security risk.¹⁸⁵

174. *Trade Policy: Ukraine*, THE EUROPEAN COMM’N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/ukraine/> (last updated Apr. 7, 2016).

175. *Id.*

176. See *EU and Ukraine Deep and Comprehensive Free Trade Area*, THE EUROPEAN COMM’N, available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150981.pdf (last visited Nov. 15, 2015).

177. See *Explanatory Notes to the Combined Nomenclature of the European Union*, THE EUROPEAN COMM’N, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2015.076.01.0001.01.ENG&toc=OJ.C:2015:076:TOC (last visited Apr. 11, 2016).

178. *Update of the EU Control List of Dual-Use Items*, THE EUROPEAN COMM’N, (Oct. 22, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153907.pdf.

179. *Id.*

180. The regulation will receive its registration number when published in the Official Journal of the European Union.

181. Council Regulation 428/2009, 2009 O.J. (L 134) 428 available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2009.134.01.0001.01.ENG&toc=OJ.L:2009:134:TOC. Amended by: Commission Delegated Regulation 1382/2014, 2014 O.J. (L 371) 1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1382&qid=1460435624056&from=EN> (last visited Nov. 15, 2015).

182. *Update of the EU Control List of Dual-Use Items*, supra note 178.

183. See generally *id.*

184. See The European Commission, *Commission Updates EU Control List on Dual Use Items*, (Oct. 22, 2014) <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1166>.

185. *Id.*

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E. WCO GUIDE TO CUSTOMS VALUATION AND TRANSFER PRICING

On June 26, 2015, the World Customs Organization issued a Guide to Customs Valuation and Transfer Pricing.¹⁸⁶ The key message of the report is that customs officials are encouraged to consider transfer pricing studies in the “circumstances of sale” analysis when determining whether transaction value may be accepted in related party transactions.¹⁸⁷

V. Chilean Legal Developments¹⁸⁸

A. AMENDMENT TO SELF-ACCUSATION REGULATIONS IN THE CUSTOMS ORDINANCE

As set forth by a 2014 tax reform in Chile¹⁸⁹, on January 1, 2015, an amendment to Article 177 of the Chilean Customs Ordinance¹⁹⁰ entered into force. This article regulates the self-accusation (*autodenuncio*) of individuals and legal entities before the SNA, after committing certain customs offenses triggered by the filing of customs declarations with incorrect and/or inaccurate information that, in turn, cause the payment of incorrect amounts of customs duties and taxes. As a result of this amendment, as of January 1, 2015, the SNA is no longer legally authorized to formulate accusations and/or apply fines originating from such customs offenses, provided that: (a) these are duly notified by the infringing party to the SNA prior to the commencement of any auditing or supervising proceeding against the infringing party, and (b) all relevant customs duties and taxes are fully paid. The SNA has construed that auditing or supervising proceedings comprehend all actions, requests, or processes carried out by the SNA to verify the existence of a customs offense in the filing of customs declarations.¹⁹¹ But it has also determined that all such proceedings must have been duly notified to the breaching party for the latter to be unable to exercise its right to file a self-accusation.¹⁹²

Thus, the main purposes of this amendment were to: (a) eliminate the prior discretionary nature of self-accusations, in which the SNA could, at its sole discretion, decide if a reduction or elimination of fines was applied or not; and (b) increase duties and tax collection by incentivizing the exercise of self-accusations by guaranteeing the exemption of fines, while requiring the payment of outstanding duties and taxes.

The SNA has construed that this amendment is only applicable to customs declarations filed after January 1, 2015, i.e., the SNA may still exercise its discretionary authorities in

186. *WCO Guide to Customs Valuation and Transfer Pricing*, WORLD CUSTOMS ORG., available at <http://www.wcoomd.org/en/topics/key-issues/revenue-package/-/media/36DE1A4DC54B47109514FFCD0AAE6B0A.ashx> (last visited Nov. 15, 2015).

187. *Id.*

188. Section Editors/Authors: Marcos Ríos, Carey y Cía; Matías Vergara and Patricio Laporta, Carey y Cía. 189. Law No. 20780, Septiembre 26, 2014, Diario Oficial [D.O.] (Chile), art. 11, available at <http://www.leychile.cl/Navegar?idNorma=1067194>.

190. Decree with Force of Law No. 30, Octubre 18, 2004 (Chile), art. 177, available at <http://www.leychile.cl/Navegar?idNorma=238919&idVersion=2014-10-10>.

191. SNA Resolution No. 7303, Diciembre 30, 2014 (Chile), par. 2, available at https://www.aduana.cl/aduana/site/artic/20141230/asocfile/20141230161941/res_7303_30_12_2014.pdf.

192. *Id.* par. 2.

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respect of imports and self-accusations regarding customs declarations filed before January 1, 2015.¹⁹³

B. CUSTOMS REGULATIONS MODERNIZATION BILL

On June 30, 2015, a bill aiming to amend several Chilean customs regulations¹⁹⁴ was submitted to the Chilean Congress (the “Bill”).¹⁹⁵ The Bill was drafted and submitted in response to, among other matters: (a) an increasing volume of international trade operations involving Chile over the last decade, representing 53% of its domestic product as of 2004; (b) the ratification of several new bilateral and multilateral trade agreements; and (c) the need to improve the SNA’s collection methods of applicable customs duties and taxes.¹⁹⁶

Considering these matters, the Bill seeks to modernize and overhaul Chilean customs regulations and strengthen existing authorities by: (a) regulating the legal concept of authorized economic operators, i.e., parties involved in the logistics management of international trade, certified by the SNA, in compliance with the WCO Framework of Standards to Secure and Facilitate global trade;¹⁹⁷ (b) granting a legal statute to regulations regarding the rights and obligations applicable to international courier companies,¹⁹⁸ currently only regulated in SNA resolutions;¹⁹⁹ (c) authorizing the use and commercialization of imported goods by certain companies and operators, before the payment of applicable customs tariffs and taxes (i.e., an exception to general import regulations), following the granting of a guarantee;²⁰⁰ (d) increasing the term within which consignees may request the reimbursement of customs fees and taxes paid in excess, from one to three years from such payment;²⁰¹ and (e) further regulating the customs destination regime entitled “temporary admission for the perfecting of assets” (*admission temporal para perfeccionamiento activo*), which authorizes Chilean manufacturers of export goods to enter supplies into Chile for their processing, perfecting, and exporting.²⁰²

In light of the growing volume of Chilean international trade operations and the rising number of preferential treatments available and set forth in commercial trade agreements, the Bill also seeks to strengthen the supervising authorities of the SNA. Thus, the Bill would authorize the SNA to reject all customs entry declarations aiming to benefit from preferential treatment and/or customs destination regimes that suspend the payment of applicable customs tariffs and taxes, in such cases where the person filing such declaration: (a) registers one or more outstanding debts from unpaid tariffs, taxes, and fines/penalties

193. SNA Official Form Letter No. 7894, issued July 22, 2015 [content reserved].

194. The Bill would amend, among others: (a) Decree with Force of Law Nr. 30, containing the Customs Ordinances; (ii) Ministry of Treasury Decree No. 1,148, containing applicable customs tariffs; and (c) Decree with Force of Law Nr. 329, which regulates the legal statute of the SNA.

195. Legislative Bulletin No. 10165-05, Julio 1, 2015 (Chile), available at https://www.camara.cl/pley/pley_detalle.aspx?prmID=10587&prmBoletin=10165-05.

196. *Id.* Section I No. 1, Presidential Message.

197. *Id.* Article 1 No. 5, Presidential Message.

198. *Id.* Article 1 No. 4, Presidential Message.

199. SNA Exempt Resolution No. 7263, Diciembre 26, 2014 (Chile), available at http://www.aduana.cl/aduana/site/artic/20140103/asocfile/20140103170904/resolucion_7263.pdf.

200. *Supra* note 195, Article 1 No. 10, Presidential Message.

201. *Id.* Article 1 No. 7a, Presidential Message.

202. *Id.* Article 1 No. 11, Presidential Message.

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for an amount greater than 200 UTM (*monthly tax unit*, approximately USD 16,000) for a period of over a year; (b) has been convicted for customs offenses; and/or (c) has materially breached customs regulations, as determined by the SNA's National Director.²⁰³

203. *Id.* Article 1 No. 5, Presidential Message.

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