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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 2017 in customs law, including United States legislative, administrative, executive, and trade developments, as well as Canadian and European legal developments.<sup>1</sup>

### **II. U.S. Judicial Changes and Appointments**

There were no changes to the U.S. Court of Appeals for the Federal Circuit (CAFC) or the U.S. Court of International Trade (CIT) in 2017.

### **III. Review of Customs-Related Determinations<sup>2</sup>**

#### **A. OVERVIEW OF DECISIONS BY THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT<sup>3</sup>**

##### *1. Schlumberger Technology Corporation v. United States (Classification)*

The CAFC affirmed the CIT’s decision<sup>4</sup> regarding the tariff classification of granular bauxite proppants, which are designed to prevent fissure sealing during hydrofracking operations, as “aluminum ores and concentrates” under Harmonized Tariff Schedule of the United States (“HTSUS” or

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\* The committee editor of this article is Rebecca A. Rodriguez, Esq., an Associate Attorney with GrayRobinson, P.A. in Miami, Florida. Section editors and contributors are identified in each section.

1. For developments during 2016, see Geoffrey Goodale, et al., *Customs Law*, 51 INT’L LAW. 5 (2017).

2. Section Editor: Luis F. Arandia, Jr., Esq.; Section Authors: Luis F. Arandia, Jr., Esq., Attorney, Givens & Johnston PLLC; Kathleen M. Murphy, Esq., Partner, Drinker Biddle & Reath LLP; and Bryan K. Rowlands, Esq., Legal Counsel and TCO, Ultra Electronics Flightline Systems.

3. Kathleen M. Murphy, Esq., Partner, Drinker Biddle & Reath LLP, with the assistance of William Rucker and Mollie Sitkowski.

4. *Schlumberger Tech. Corp. v. United States*, 91 F. Supp. 3d 1304, 1324 (Ct. Int’l Trade 2015), *aff’d*, 845 F.3d 1158 (Fed. Cir. 2017).

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“HTS”) subheading 2606.<sup>5</sup> In the lower court determination, Chief Judge Timothy C. Stanceu ruled that bauxite proppants were improperly classified by U.S. Customs and Border Protection (CBP) under heading 6909 as “ceramic wares for laboratory, chemical or other technical uses” or, alternatively, under heading 6914 as “ceramic articles.”<sup>6</sup> The Chief Judge disagreed with CBP’s narrow assertion that the bauxite proppants fall outside heading 2606 because they are produced from non-metallurgical grade bauxite and, in addition, rejected the premise that the production process changes their character from aluminum ores (bulk substances) to ceramic articles possessing a definite shape.<sup>7</sup>

The CAFC agreed with the CIT Chief Judge’s broader interpretation of heading 2606, noting that Note 2 to Chapter 26 includes ores “even if they are intended for non-metallurgical purposes.”<sup>8</sup> Further, relying on the HTS Explanatory Notes (ENs) to Chapter 69 for guidance, the CAFC agreed with the CIT’s holding that the production process does not impart a finished shape to the bauxite proppants making them “ceramic wares,” and that the granules are not “ceramic articles,” noting that they were not of a kind of merchandise typically treated as “articles” for tariff classification purposes.<sup>9</sup> The subject granular proppants do not involve individual products shaped into definite forms.

2. *The Container Store v. United States (Classification)*

This case addressed whether components of a modular storage system are classified as “parts” of unit furniture or as base metal mountings. The CAFC reversed the CIT’s classification<sup>10</sup> of modular storage components under HTSUS subheading 8302.42.30, and determined that they were properly classified under HTSUS subheading 9403.90.80.<sup>11</sup> Two separate CIT judges considered the proper tariff classification of modular storage components, with one holding that they were properly classified under HTSUS heading 8302 and the other holding that they were properly classified under HTSUS heading 9403.<sup>12</sup> The Container Store appealed from the CIT decision classifying its products under HTSUS heading 8302, but the government did not appeal the CIT decision classifying the products under HTSUS heading 9403.

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5. *Schlumberger Tech. Corp. v. United States*, 845 F.3d 1158 (Fed. Cir. 2017).

6. *Id.* at 1161-63.

7. *Id.* at 1165.

8. *Id.* at 1167; USITC, Harmonized Tariff Schedule of the United States, ch. 26, n. 2 (2018).

9. *Schlumberger Tech. Corp.*, 845 F.3d at 1164.

10. *The Container Store v. United States*, 145 F. Supp. 3d 1331, 1333 (Ct. Int’l Trade 2016), *rev’d sub nom.* *The Container Store v. United States*, 864 F.3d 1326 (Fed. Cir. 2017).

11. *Container Store v. United States*, 864 F.3d 1326, 1327 (Fed. Cir. 2017).

12. *Container Store*, 145 F. Supp. 3d at 1333; *Container Store v. United States*, 800 F. Supp. 2d 1329, 1331 (Ct. Int’l Trade 2011), *dismissed sub nom.* *The Container Store v. United States*, 470 F. App’x 899 (Fed. Cir. 2012).

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The CAFC found the ENs for heading 8302 to be persuasive in the analysis of the subject products, along with its previous decision in *StoreWALL, LLC v. United States*.<sup>13</sup> Specifically, the ENs draw a sharp distinction between general purpose accessory fittings and mountings and goods forming an essential part of the structure of an article. The CAFC concluded that the modular storage components at issue served as the frame or support structure for the complete modular system, meaning they were essential components of that system and excluded from classification under HTSUS heading 8302. Moreover, pursuant to *StoreWALL*, the CAFC found that the modular system constituted “unit furniture”<sup>14</sup> classifiable under HTSUS heading 9403 because it hung on a wall, was fitted with other pieces to form a larger system, and could be assembled together in various ways. Therefore, the CAFC held that the components that comprised the system constituted parts of that unit furniture and were properly classified under HTSUS subheading 9403.90.80.

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

CIT has exclusive jurisdiction over any civil action commenced pursuant to 28 U.S.C. § 1581 and 28 U.S.C. § 1582.<sup>15</sup> In the context of customs litigation, the two subparagraphs of § 1581 most frequently invoked by litigants are subparagraphs (a)<sup>16</sup> and (i).<sup>17</sup>

*1. Classification Cases*

*a. Allstar Marketing Group, LLC v. United States (Classification)*

The issue in this case was whether a sleeved polyester fleece item, referred to as a “Snuggie®,” is a blanket, a garment, or “wearing apparel.”<sup>18</sup> The

13. *StoreWALL, LLC v. United States*, 644 F.3d 1358 (Fed. Cir. 2011).

14. *The Container Store*, 864 F.3d 1330.

15. “The Court of International Trade shall have exclusive jurisdiction of 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.

16. 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.”

17. 28 U.S.C. § 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.”

18. *Allstar Mktg. Grp., LLC v. United States*, 211 F. Supp. 3d 1319, 1323 (Ct. Int’l Trade 2017).

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physical characteristics of the article included armholes and sleeves, and marketing and advertising described it as a blanket. CBP classified the Snuggie imports as a “garment” for tariff classification purposes, claiming that this term is broad enough to cover “an outer covering for the human body.”<sup>19</sup>

In granting summary judgment to Allstar Marketing Group, LLC (Allstar), Judge Mark A. Barnett revisited the CAFC’s 2003 decision in *Rubie’s Costume Company v. United States*<sup>20</sup> involving a tariff disagreement over Halloween costumes in which the CAFC held that they do not resemble a normal article of apparel, but rather are worn to promote a festive event. Further, Judge Barnett noted that the Snuggie’s physical characteristics and features (the loose fitting nature of the item and lack of closures) are not indicative of a garment or wearing apparel. Similarly, all sales and marketing materials described the article as a blanket.

Accordingly, the Court granted Allstar’s motion for summary judgment and denied CBP’s cross motion, ruling that the Snuggie is classified under HTS subheading 6301.40.00 as “[b]lankets (other than electric blankets) and traveling rugs, of synthetic fibers.”<sup>21</sup>

b. *Ford Motor Company v. United States* (Classification)

This case concerns whether imported vehicles are classified as vehicles for the transport of persons or vehicles for the transport of goods when they are imported with seats and other parts used to transport persons, but those parts are removed after entry, and the vehicles are sold for the transport of goods.<sup>22</sup> Ford Motor Company argued that the imported vehicles were properly classified under HTSUS subheading 8703.23.00 as passenger vehicles, while Customs argued that they were properly classified under HTSUS subheading 8704.31.00 as vehicles for the transport of goods. The court found that Ford had engaged in permitted tariff engineering when it decided to manufacture its products to take advantage of the lower duty rate on vehicles for the transport of persons. The court rejected Customs’ argument that impermissible tariff engineering occurs when the products have no commercial utility as imported. In so doing, the court continued a long line of precedential holdings that have found impermissible tariff engineering to occur when importers artificially change an article’s appearance. The proper question was not whether the vehicles would be principally used to transport persons after importation, but whether they were principally designed to transport persons at the time of importation. The court found that the vehicles were principally designed to transport persons given the fully-functioning seats and other passenger features, and therefore held that the vehicles were properly classified under HTSUS

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19. *Id.* at n.3.

20. *Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1352 (Fed. Cir. 2003).

21. *Allstar Mktg. Grp., LLC*, 211 F. Supp. 3d at 1335 (citing HTSUS subheading 6301.40.00).

22. *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297, 1302 (Ct. Int’l Trade 2017).

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subheading 8704.31.00. At the time of publishing this article, the government appealed the court's decision, but the appeal is still ongoing.

c. *Irwin Industrial Tool Company v. United States* (Classification)

This case concerns the proper tariff classification of certain hand tools known as “locking pliers.”<sup>23</sup> Irwin Industrial Tool Company argued that the locking pliers were properly classified as pliers under HTSUS subheading 8203.20, while Customs argued that the locking pliers were properly classified as adjustable wrenches under HTSUS subheading 8204.12. Ruling on the government's initial motion for summary judgment, the CIT held that the locking pliers were not “wrenches,” but may be classified under the tariff provisions for “pliers” or “vises, clamps and the like” under Heading 8205.<sup>24</sup> The CIT construed the relevant tariff headings and held that the term “pliers” refers to “a versatile hand tool with two handles and two jaws that are flat or serrated and are on a pivot, which must be squeezed together to enable the tool to grasp an object.”<sup>25</sup> Denying the government's motion to reconsider its initial opinion, the CIT found that the locking pliers meet the definition of “pliers” and are classifiable under HTSUS subheading 8203.20.

d. *The Gerson Company v. United States* (Classification)

This case concerns the proper tariff classification of light-emitting diode (“LED”) candles.<sup>26</sup> The CIT confirmed Customs' classification of the LED candles under HTSUS subheading 9405.40.80 and denied the plaintiff's claim for reclassification in HTSUS subheading 8543.70.70. The court found that the LED candles fell within common definitions of the word “lamp.” The term “lamp” appears in HTSUS subheading 9405.40 (Other Electric Lamps and Lighting Fittings) and subheading 8543.70 (Electric Luminescent Lamps). The CIT held that the drafters of the Harmonized Commodity Description and Coding System (“Harmonized System”) adopted a “general organizing principle”<sup>27</sup> that chapter 85 includes lamps that are not used independently, while lamps that are used independently are classified under heading 94.05. Based on the CIT's analysis, lamps that are self-contained, or independently used, and suitable for household use as illuminating and decorative articles (*e.g.*, furnishing type, stand-alone lamps), fall within heading 9405, not heading 8543. Electric lamps of chapter 85 are limited to those not used independently (*e.g.*, light bulbs). The CIT determined that the LED candles are stand-alone electric lamps classifiable under HTSUS subheading 9405.40.80.

23. *Irwin Indus. Tool Co. v. United States*, 269 F. Supp. 3d 1294, 1297 (Ct. Int'l Trade 2017).

24. *Id.* (citing *Irwin*, 222 F. Supp. 3d at 1210 (Ct. Int'l Trade)).

25. *Id.* (citing HTSUS heading 8205).

26. *Gerson Co. v. United States*, 254 F. Supp. 3d 1271, 1272 (Ct. Int'l Trade 2017).

27. *Id.* at 1278 (citing HTSUS subheading 1701.99.05.00).

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2. *Civil Penalty Cases (19 U.S.C. § 1592)*a. *United States v. International Trading Services, LLC and Julio Lorza (Personal Liability)*

The United States brought an action to recover a civil penalty under 19 U.S.C. §1592 against International Trading Services, LLC (ITS) and its CEO, Julio Lorza, regarding misclassified shipments of sugar.<sup>28</sup> ITS, acting as importer of record, entered the sugar under an incorrect HTSUS subheading of heading 1701, which provides for “[c]ane or beet sugar and chemically pure sucrose, in solid form.”<sup>29</sup> ITS’s classification had a lower duty rate per kilogram than the correct subheading and ITS owed the duty difference.

The CIT considered a fourteen-factor analysis to determine the appropriate civil penalties under 19 U.S.C. §1592(c)(3) and awarded the maximum penalty for negligence because ITS and Mr. Lorza made material false statements regarding the classification of the sugar. CIT further found that ITS and Mr. Lorza did not provide any evidence to refute CBP’s claim of negligence, thereby failing to show they demonstrated reasonable care. Both ITS and Mr. Lorza were found jointly and severally liable for the unpaid duties, penalties, and applicable interest.<sup>30</sup> Mr. Lorza’s liability was due to the fact he was personally involved in the introduction of the imported sugar into the commerce of the United States, reaffirming a 2014 CAFC decision<sup>31</sup> on importer liability.

b. *United States v. Sterling Footwear, Inc. (Penalty Liability)*

The CIT ruled in favor of the United States against Sterling Footwear, Inc. (Sterling) in a civil penalty action regarding the misclassification of 337 entries of footwear into the U.S. from 2007 to 2009.<sup>32</sup> The U.S. government sought to hold Sterling, Mr. Alex Ryan Ng, Sterling’s president, and Ng Branding, a company majority-owned by Mr. Ng, responsible for the misclassifications. Mr. Ng was Sterling’s president, chief executive officer, and majority shareholder (owning at least 95 percent of the shares). In 2009, CBP reviewed samples of Sterling’s entries and informed Sterling of the misclassification of its footwear merchandise. Sterling both failed to amend previous misclassifications and continued to erroneously classify imported products, a practice the government alleges was done personally by Mr. Ng and continued under Ng Branding as Sterling’s successor entity.

28. *United States v. Int’l Trading Servs., LLC*, 222 F. Supp. 3d 1325, 1329 (Ct. Int’l Trade 2017).

29. *Id.* at 1330 (citing HTSUS subheading 1701.99.05.00).

30. *Id.* at 1333.

31. *See United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1299 (Fed. Cir. 2014).

32. *United States v. Sterling Footwear, Inc.*, No. 12-00193, 2017 WL 4570545 (Ct. Int’l Trade Oct. 12, 2017).

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The U.S. government relied on *United States v. Trek Leather, Inc.*<sup>33</sup> in its case against Mr. Ng personally and against Ng Branding under the successor liability theory. The CIT granted the government's motion for summary judgment against Sterling under 19 U.S.C. 1592(c)(2) for 1.57 million dollars in unpaid duties in addition to lost revenue due to the misclassifications and Sterling's gross negligence. The motion for summary judgment against Alex Ryan Ng and Ng Branding was denied as it involved disputed facts to be determined at trial regarding Mr. Ng's personal role and Ng Branding's status as successor to Sterling.

c. *United States v. Rupari Food Services, Inc.* (Bankruptcy)

The CIT ruled against Rupari Food Services, Inc. (Rupari) in its assertion that an automatic stay in bankruptcy, effected by 11 U.S.C § 362(a) (2012), can be applied to a civil penalty action brought by the United States against a bankrupt party.<sup>34</sup> In the summer of 1998, Rupari attempted to enter five containers of Chinese crawfish tail meat by falsely claiming the meat originated in Thailand. On June 20, 2011, the government filed a complaint and requested penalties from the fraudulent violations of 19 U.S.C § 1592(a) in an amount of \$2,784,636.18 or, alternatively, “the maximum amount for”<sup>35</sup> grossly negligent or negligent violations of 19 U.S.C § 1592(a). During the CIT proceedings, Rupari filed for Chapter 11 bankruptcy protection.

Generally, the filing of a bankruptcy petition operates to stay the continuance of any judicial proceeding against a debtor. The CIT found that “the automatic stay protection does not apply to all cases; there are statutory exemptions, and there are non-statutory exceptions.”<sup>36</sup> The CIT considered various arguments from Rupari and found that the government's civil penalty action was “rooted in its enforcement of the United States customs laws to interdict and remedy the fraudulent importation of merchandise” and “falls squarely within the scope of 11 U.S.C. § 362(b)(4),”<sup>37</sup> making it exempt from the automatic stay effected by 11 U.S.C. § 362(a).

d. *United States v. Greenlight Organic, Inc.* (Bankruptcy)

In September 2017, the CIT found before it another case involving the assertion that the automatic stay in bankruptcy, effected by 11 U.S.C § 362(a) (2012), can be applied to a civil penalty brought by the United States against a bankrupt party pursuant to 19 U.S.C. § 1592.<sup>38</sup> This case

33. *Trek Leather, Inc.*, 767 F.3d at 1299.

34. *United States v. Rupari Food Servs., Inc.*, 254 F. Supp. 3d 1367, 1369 (Ct. Int'l Trade 2017).

35. *Id.* at 1370 (citing *United States v. Am. Cas. Co. of Reading Pennsylvania*, 91 F. Supp. 3d 1324 (Ct. Int'l Trade 2015), as amended (Aug. 26, 2015)).

36. *Id.* at 1371 (citing *Dominic's Rest. of Dayton, Inc. v. Mantia*, 683 F.3d 757 (6th Cir. 2012)).

37. *Id.* at 1376.

38. *United States v. Greenlight Organic, Inc.*, 264 F. Supp. 3d 1376 (Ct. Int'l Trade 2017).

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involved the fraudulent importation of athletic apparel from Vietnam, entered into the United States by Greenlight Organic, Inc. (Greenlight). The United States commenced an action on February 8, 2017 to recover unpaid duties, fees, and a penalty for the violation of U.S.C. § 1592(a). Greenlight informed the CIT that it filed for bankruptcy on July 25, 2017 and believed the government's action was stayed pursuant to 11 U.S.C. § 362(a). Using reasoning similar to that in *United States v. Rupari Food Services, Inc.*, the CIT found the government's enforcement action was within the scope of the exception of 11 U.S.C. § 362(b)(4) and therefore exempt from the automatic stay provision of 11 U.S.C. § 362(a).

*e. United States v. UPS Supply Chain Solutions, Inc. et al.* (Jurisdiction)

The CIT granted in part a motion to dismiss a cross claim made by Defendant 4174925 Canada, Inc. d/b/a/ Majestic Mills (Majestic Mills).<sup>39</sup> Majestic Mills was one of three defendants in the U.S. government's action on behalf of the CBP for unpaid duties and civil penalties under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592(a) and (d) (2012). Majestic Mills is a Canadian manufacturer of women's apparel and UPS Supply Chain Solutions, Inc. (UPS) is the customs broker and nominal importer of record of approximately 272 entries of wearing apparel and fabrics (the subject merchandise). In the cross-claim that is the subject of the motion to dismiss, UPS alleged four causes of action against Majestic Mills. UPS alleged Majestic Mills agreed to indemnify UPS from any liabilities arising from the importation of the subject merchandise through a series of contractual agreements between the two parties. The other three causes of action—breach of contract, fraud, and negligent misrepresentation—stem from Majestic Mills providing inaccurate information to UPS, upon which UPS relied to make tariff classifications to CBP.

The CIT denied the breach of contract, fraud, and negligence claims as time-barred under the Georgia statute of limitations.<sup>40</sup> The CIT allowed the indemnification claim and relied on 28 U.S.C. § 1583, granting CIT the authority to decide cross claims brought by a party to an action “if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.”<sup>41</sup>

<sup>39</sup> *United States v. UPS Supply Chain Sols., Inc.*, 269 F. Supp. 3d 1366, 1368 (Ct. Int'l Trade 2017).

<sup>40</sup> Ga. Code Ann. § 9-3-26; Ga. Code Ann. § 9-3-24.

<sup>41</sup> 28 U.S.C. § 1583.

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3. *Miscellaneous Cases*

- a. *Energizer Battery, Inc. v. United States* (Country of Origin Marking Under the Buy America Portion of the Trade Agreements Act of 1979)

Energizer challenged U.S. Customs and Border Protection (CBP)'s substantial transformation determination concerning the country of origin of a second-generation military flashlight for purposes of government procurement under the "Buy America Act" portion of the Trade Agreements Act of 1979 (1979 Act).<sup>42</sup> Energizer's flashlight is composed of approximately fifty different components (all but two of Chinese origin) that are specifically designed for use in the flashlight. The assembly, testing, and boxing of a flashlight at a Vermont facility takes approximately seven minutes and ten seconds. The CIT held that the imported components do not undergo a change in name, character, or use as a result of the post-importation processing.

Before this case, the CIT had not previously analyzed the meaning of "substantial transformation" as used in the 1979 Act. Under the 1979 Act, the test for substantial transformation is that the product is "a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed."<sup>43</sup> The Court held that the imported components do not lose their individual names as a result of the post-importation assembly. Moreover, because the components "are imported in prefabricated form with a pre-determined end-use, the assembly of those articles into the final product, without more, may not rise to the level of substantial transformation."<sup>44</sup> The Court also concluded that the post-importation processing was not sufficiently complex under the substantial transformation test.

- b. *Meyer Corporation v. United States* (Preferential Treatment Under Generalized System of Preferences)

In this action, the CIT analyzed whether sets of pots or pans from Thailand, a "beneficiary developing country" (BDC) under the Generalized System of Preferences (GSP), were disqualified from GSP preferential treatment by reason of one or more glass lids from China, a non-BDC country.<sup>45</sup> Citing TD 91-7, CBP denied Meyer's GSP claim for the cookware sets because the "product of" requirement must be applied to the imported articles as a whole, including detachable non-BDC components. The CIT analyzed the GSP statute and held, "Customs denied preferential tariff treatment to the

42. *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308, 1313–14 (Ct. Int'l Trade 2016).

43. 19 U.S.C.A. § 2518(4)(B).

44. *Energizer Battery, Inc.*, 190 F. Supp. 3d at 1322.

45. *Meyer Corp. v. United States*, 255 F. Supp. 3d 1348, 1350–51 (Ct. Int'l Trade 2017).

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Thai-made components of the set on the basis of an assumption that is invalid as a matter of law.”<sup>46</sup>

The CIT found that under tariff classification rules, a retail set under GRI 3(b) and GSP eligibility are considered differently. Customs classification is based on the *contours* of the set as a whole, whereas GSP analysis considers whether and to what extent preferential treatment extends to the *content* of the set. Consequently, the CIT granted summary judgment as to the GSP eligibility of the Thai-made cookware components but denied GSP eligibility of the non-BDC components.

c. *Milecrest Corporation v. United States and U.S. Customs & Border Protection and Duracell U.S. Operations, Inc. (Gray Market Goods and Jurisdiction)*

The CIT rejected Duracell U.S. Operations, Inc.’s (Duracell) motion to dismiss a lawsuit by Milecrest Corporation (Milecrest), an importer and distributor of gray market Duracell batteries, challenging CBP’s grant of “Lever Rule” protection to Duracell.<sup>47</sup> CBP granted Duracell’s Lever Rule protection request against gray market OEM bulk packaged batteries and foreign retail packaged batteries bearing Duracell’s trademark. After CBP issued a second notice in the U.S. Customs Bulletin, Milecrest challenged the decision because the ruling is subject to notice and comment rulemaking procedures under the Administrative Procedure Act.

The CIT found that it possessed jurisdiction for Milecrest’s lawsuit under 28 U.S.C. §1581(h) because (1) the Lever Rule grant (issued under 19 C.F.R. § 133.0) is a ruling reviewable under §1581(h), (2) Milecrest had adequately plead irreparable harm, and (3) Milecrest had prudential standing to bring the challenge. Moreover, Milecrest survived a Rule 12(b)(6) motion because it was entitled to relief if the CIT (1) determined that the Lever Rule grant was subject to notice and comment rulemaking requirements, (2) the Lever Rule grant imposed restriction on gray market goods that are not physically and materially different from Duracell-authorized goods, or (3) the Lever Rule grant was impermissibly vague.

#### IV. Expansion of Trade Remedy Efforts<sup>48</sup>

##### A. CBP INVESTIGATES EVASIONS OF AD/CVD ORDERS

The Trump Administration’s intent to fully enforce the 2016 Trade Facilitation and Trade Enforcement Act (TFTEA) provisions known as the

46. *Id.* at 1358.

47. *Milecrest Corp. v. United States*, 264 F. Supp. 3d 1353, 1357 (Ct. Int’l Trade 2017).

48. Section Editor: Matt Nakachi; Section Authors: D. “Bonni” van Blarcom, Ph.D., Trade Policy Consultant at Trade Policy Consulting of Wheaton, MD; James Feroli, Attorney, Catholic Charities Immigration Legal Services, Washington, DC; Matt Nakachi, Member, Junker & Nakachi, P.C., San Francisco, California.

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Enforce and Protect Act (EAPA)<sup>49</sup> could be seen in the issuance of an Executive Order on March 31, 2017, stating, “It is therefore the policy of the United States to impose appropriate bonding requirements, based on risk assessments, on entries of articles subject to antidumping and countervailing duties, when necessary to protect the revenue of the United States.”<sup>50</sup> Over the past few years, there has been a heightened sense of enforcement. CBP’s Commercial Customs Operations Advisory Committee (“COAC”) has been considering a number of options. During their November 2017 meeting, COAC considered the concept of adjusting bonds based on risk, starting with a pilot initiative using statistically valid analysis. COAC also endorsed the “idea of a supplemental AD/CV bond, which it said should be available as a single transaction or continuous bond, have a separate activity code, and be required to secure the potential shift in AD/CV duty rates for active orders (of which there are currently about 420).”<sup>51</sup>

During Fiscal Year 2016, CBP “enforced 364 AD/CVD Orders covering around 150 products. In addition, during that time period \$13.9 billion of imported goods were subject to AD/CVD, and CBP collected \$1.5 billion in AD/CVD deposits.”<sup>52</sup> New authority to investigate AD/CVD evasions is provided to CBP under TFTEA. An interim final regulation<sup>53</sup> on these investigations was issued by CBP in October 2016 and provided CBP authority to take direct action, in addition to requests from the Department of Commerce.<sup>54</sup>

EAPA authorizes CBP to request more information, enables more interested parties to petition them, and it sets time limits on investigation stages. Along with the skyrocketing of AD/CVD cases being brought during the Trump Administration, the electronic web portal for companies to electronically file allegations of evasion advanced from the electronic submissions started in 2008. CBP expects investigation requests to increase.

As of September 2017, CBP initiated 14 cases under the new law. The first case was concluded in August 2017. CBP found that Eastern Trading evaded antidumping duties by claiming that wire hangers were manufactured in Thailand; CBP determined that they were transshipped from China

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49. Trade Facilitation and Trade Enforcement Act of 2015, PL 114-125, 130 Stat. 122, Title IV, § 421 (2016).

50. E.O. No. 13785 Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws, 82 Fed. Reg. 16,719 (Mar. 31, 2017).

51. *Supplemental Bonds, Other Measures Under Consideration to Aid AD/CV Duty Collections*, SANDLER, TRAVIS & ROSENBERG, P.A. 1, (Nov. 29, 2017) <https://www.strtrade.com/news-publications-supplemental-bond-AD-CV-duty-CBP-112917.html>.

52. Press Release, Kevin K. McAleenan, Acting Commissioner, U.S. Customs and Border Protection, TFTEA – One Year Later (Feb. 27, 2017), <https://www.cbp.gov/newsroom/blogs/tftea-one-year-later>.

53. 19 C.F.R. § 165.0.

54. Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 72,692 (Oct. 21, 2016) (to be codified at 19 C.F.R. pt. 165).

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through Thailand.<sup>55</sup> CBP estimated that the nine investigations on wire hangers “resulted in CBP preventing evasion of over \$33 million dollars in unpaid antidumping duties annually.”<sup>56</sup> The remaining U.S. producer, M&M Metal Products Company, filed an additional eight allegations, suspecting other transshipments through Malaysia to avoid antidumping duties.<sup>57</sup> In another case, the American Furniture Manufacturers Committee for Legal Trade (AFMC) alleged that producers are misreporting actual producers to avoid AD duties. An interim measure on a duty evasion investigation of wooden bedroom furniture was announced in August and will be finalized in March 2018.<sup>58</sup>

In addition to investigating evasion of AD/CVD orders, the Trump Administration is using an infrequently-used authority for government-initiated investigations, for instance, AD/CVD investigation of common alloy aluminum sheet from China.<sup>59</sup> Usually investigations are initiated by industries claiming harm from unfairly traded imports.

**B. COUNTERING AMERICA’S ADVERSARIES THROUGH SANCTIONS ACT (P.L. 115-44)**

President Trump applied new sanctions on Iran and North Korea, and on August 2, 2017, signed into law the Countering America’s Adversaries through Sanctions Act (CAATSA or the Act) stating that “I favor tough measures to punish and deter bad behavior by the rogue regimes in Tehran and Pyongyang” while noting that the bill is seriously flawed as it “encroaches on the executive branch’s authority to negotiate.”<sup>60</sup> The Act directs the President to impose new sanctions on Iran, Russia, and North

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55. Press Release, Kevin K. McAleenan, Acting Commissioner, U.S. Customs and Border Protection, Ensuring a Level Playing Field (Sept. 13, 2017), <https://www.cbp.gov/newsroom/blogs/ensuring-level-playing-field>.

56. Press Release, U.S. Customs and Border Protection, U.S. Customs and Border Protection Exercises EAPA Authority, Launches Multiple Investigations on Illegal Imports From China (Aug. 17, 2017), <https://www.cbp.gov/newsroom/national-media-release/us-customs-and-border-protection-exercises-eapa-authority-launches>.

57. U.S. Customs and Border Protection, Notice Letter on the initiation of an investigation and interim measures taken as to Aspects Furniture International, Inc. concerning evasion of the antidumping duty order on Wooden Bedroom Furniture from the People’s Republic of China 1 (Aug. 14, 2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Aug/TRLED%20Notice%20of%20Investigation%20and%20Interim%20Measures%20%287189%29%20-%20PV.PDF>.

58. Ensuring a Level Playing Field, *supra* note 55.

59. Press Release, Office of Public Affairs, United States Department of Commerce, U.S. Department of Commerce Self-Initiates Historic Antidumping and Countervailing Duty Investigations on Common Alloy Aluminum Sheet From China (Nov. 28, 2017), <https://www.commerce.gov/news/press-releases/2017/11/us-department-commerce-self-initiates-historic-antidumping-and>.

60. Press Release, The White House, Statement by President Donald J. Trump on Signing the “Countering America’s Adversaries Through Sanctions Act” (Aug. 2, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-signing-countering-americas-adversaries-sanctions-act/>.

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Korea, while allowing him to waive Russian cyber and Ukraine related sanctions. A White House memorandum delegated implementation of various segments of the Act to State, Treasury, and Homeland Security.<sup>61</sup> The Treasury Department noted that “Differing foreign policy and national security objectives may result in differing interpretations of similar language among the three titles of CAATSA.”<sup>62</sup> The 2003 Global Terrorism Sanctions Regulations were amended by the Department of Treasury Office of Foreign Assets Control in October 2017.<sup>63</sup>

**C. WAY FORWARD ON GLOBAL STEEL OVERCAPACITY**

For years, the United States has participated in discussions regarding steel at the Organization for Economic Co-operation and Development (OECD), the World Trade Organization Subsidies Committee, the Asian Pacific Economic Cooperation, the US-China Steel Dialogue, the North American Steel Trade Committee, and, most recently, the G-20. In July 2017, China and the United States agreed that steel production overcapacity is a global issue.<sup>64</sup> Since 2007, China has added new capacity of 552 metric tons (estimated to be seven times the total U.S. steel production in 2015), which has added to the problem,<sup>65</sup> but U.S. imports of Chinese steel decreased in 2017. The United States took steps to address the issue unilaterally with the initiation of the infrequently-used Section 232 of the Trade Expansion Act of 1962 (Safeguarding National Security). Previous global oversupply during the 1980s was addressed with reduction of subsidies. OECD estimates that “nearly 40 million tonnes of gross capacity additions are currently underway and could come on stream during the three year-period of 2017-19.”<sup>66</sup> The G-20 Global Forum on Steel Excess Capacity is discussing a way to jointly coordinate reducing overcapacity.<sup>67</sup> Participants include the United States, China, European Union, Germany, and Japan.

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61. Press Release, Office of the Press Secretary, The White House, Memorandum for the Secretary of State, the Secretary of the Treasury, the Secretary of Homeland Security Regarding the Delegation of Certain Functions and Authorities under the Countering America’s Adversaries Through Sanctions Act of 2017 sec. 1 (Oct. 12, 2017), [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran\\_delegation\\_memo.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran_delegation_memo.pdf).

62. *Countering America’s Adversaries Through Sanctions Act*, U.S. DEPARTMENT OF THE TREASURY, <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/caatsa.aspx>.

63. U.S. Department of Treasury, Global Terrorism Sanctions Regulations, 82 Fed. Reg. 50,313 (Oct. 31, 2017) (to be codified at 31 C.F.R. pt. 594), *available at* [https://www.treasury.gov/resource-center/sanctions/Programs/Documents/fr82\\_50313.pdf](https://www.treasury.gov/resource-center/sanctions/Programs/Documents/fr82_50313.pdf).

64. Xinhua, *China, US recognize that steel overcapacity requires global solution*, CHINA DAILY (Jul. 21, 2017), [http://www.chinadaily.com.cn/business/2017-07/21/content\\_30197321.htm](http://www.chinadaily.com.cn/business/2017-07/21/content_30197321.htm).

65. Lukas Brun, *Overcapacity in Steel China’s Role in a Global Problem*, at 1, Duke University Center on Globalization, Governance & Competitiveness (2016).

66. Data Release, The Organisation for Economic Co-operation and Development (OECD), *Steelmaking Capacity* (Jul. 2017), <http://www.oecd.org/sti/ind/steelcapacity.htm>.

67. Press Release, The Organisation for Economic Co-operation and Development (OECD), *OECD welcomes outcome of Global Forum on Steel Excess Capacity Ministerial* (Nov. 30,

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The question of whether sufficient political impetus will exist in 2018 for concrete policy proposals to be agreed upon and implemented still remains.

## V. Canadian Legal Developments<sup>68</sup>

### A. FREE TRADE AND INVESTMENT

The two free trade agreements that Canada concluded in 2016 came into force this year. More specifically, on August 1, 2017, the Canada-Ukraine Free Trade Agreement (CUFTA) entered into force<sup>69</sup>, and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came into force, on a provisional basis, as of September 21, 2017.<sup>70</sup>

The CETA has only been applied on a provisional basis, due to a decision by the European Commission in July 2016 to treat the CETA as being of “mixed competence” for the purposes of ratification.<sup>71</sup> Full application of the agreement requires approval by the European Parliament, by each European Union national government, and in some cases, by regional governments. But the vast majority of the CETA is now in force—between ninety and ninety-five percent of the agreement<sup>72</sup>—and the excluded provisions, which must wait until the EU’s ratification process is complete, relate to Investor State Dispute Settlement, related sections of the financial services chapter, and certain provisions of the intellectual property chapter that concern pirating.

In October of 2012, Canada joined the negotiations for the Trans-Pacific Partnership (TPP), later signed on February 4, 2016.<sup>73</sup> The future of the TPP was cast into doubt just over one year later, when the United States

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2017) <http://www.oecd.org/newsroom/oecd-welcomes-outcome-of-global-forum-on-steel-excess-capacity-ministerial.htm>.

68. Section Editor: Greg Kanargelidis; Section Authors: Greg Kanargelidis, partner with Blake, Cassels & Graydon LLP in Ontario, Canada; Daniel L. Kiselbach, partner with Deloitte Tax Law LLP in Vancouver, Canada; Zachary Silver, associate attorney with Blake, Cassels & Graydon LLP in Toronto, Canada.

69. Canada-Ukraine Free Trade Agreement (CUFTA), Can.-Ukr., Jul. 11, 2016; *Canada and Ukraine: Creating jobs and opportunities together*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/canada-ukraine.aspx?lang=eng>.

70. Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Can.-E.U., Oct. 30, 2016, 2017 O.J. (L 11) 2; *Canada-European Union Comprehensive Economic and Trade Agreement (CETA)*, GLOBAL AFFAIRS CANADA, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng>.

71. Andrea Columbano, *The EU-Canada trade agreement (CETA): a blueprint for future trade negotiations?*, MEDIUM (Feb. 23, 2017), <https://medium.com/@andreacolumbano.1983/the-eu-canada-trade-agreement-ceta-a-blueprint-for-future-trade-negotiations-4e912d736043>.

72. EU, *Canada agree start of free trade agreement*, REUTERS (Jul. 8, 2017), <https://www.reuters.com/article/us-canada-cu-trade/eu-canada-agree-start-of-free-trade-agreement-idUSKBN19T0PC>.

73. Press Release, Global Affairs Canada, Canada Formally Joins Trans-Pacific Partnership (Oct. 9, 2012), [http://www.international.gc.ca/media\\_commerce/comm/news-communiques/2012/10/09a.aspx?lang=eng](http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/10/09a.aspx?lang=eng); Press Release, Office of the United States Trade Representative,

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gave its notification of intent not to ratify the TPP on January 30, 2017.<sup>74</sup> Despite the U.S. withdrawal from the TPP, ministers of the remaining eleven signatory states continued to meet, first in Toronto from May 2 through May 3, 2017, and again on May 21, 2017 in Hanoi, to explore potential next steps.<sup>75</sup> Senior officials from the remaining TPP signatory states met several more times during the summer and fall of 2017, culminating in a meeting on the margins of the APEC Leader's Meeting in Da Nang, Vietnam, in November 2017.<sup>76</sup> At that meeting, the ministers from the eleven TPP countries arrived at an agreement in principle respecting core elements of an agreement, now called the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).<sup>77</sup>

Canada and the People's Republic of China announced on September 22, 2016 the initiation of exploratory discussions towards a possible Canada-China Free Trade Agreement.<sup>78</sup> But the first round of meetings on the potential free trade agreement (FTA) did not occur until February 20, 2017. A second round of meetings followed shortly after, from April 24 through April 28, 2017, with the most recent meetings held from July 31 to August 4, 2017. Canada and China have undertaken a joint feasibility study to gauge the potential benefits of an FTA.

On September 8, 2017, Canada announced an agreement to begin exploratory discussions regarding a potential FTA with the Association of Southeast Asian Nations (ASEAN), which is composed of Cambodia, Brunei, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.<sup>79</sup>

This year also saw a resurgence of interest in a potential Canada-MERCOSUR Free Trade Agreement. Exploratory discussions towards an FTA with MERCOSUR, composed of Argentina, Brazil, Paraguay, and Uruguay, were initiated in 2011, but did not lead to a decision to move

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Trans-Pacific Partnership Ministers' Statement (Feb. 4, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>.

74. Brock R. Williams and Ian F. Fergusson, *The United States Withdraws from the TPP*, FEDERATION OF AMERICAN SCIENTISTS (May 23, 2017), <https://fas.org/sgp/crs/row/IN10646.pdf>.

75. *TPP Meetings in Toronto Look to Set Stage for Hanoi Talks*, ICTSD (May 4, 2017), <https://www.ictsd.org/bridges-news/bridges/news/tpp-meetings-in-toronto-look-to-set-stage-for-hanoi-talks>.

76. News Release, APEC, APEC Leaders Issue Da Nang Declaration (Nov. 11, 2017), [https://www.apec.org/Press/News-Releases/2017/1111\\_declaration](https://www.apec.org/Press/News-Releases/2017/1111_declaration).

77. Press Release, Global Affairs Canada, Minister Champagne Welcomes Progress on the Comprehensive and Progressive Trans-Pacific Partnership (Nov. 10, 2017), [https://www.canada.ca/en/global-affairs/news/2017/11/minister\\_champagnewelcomesprogressonthecomprehensiveandprogressi.html](https://www.canada.ca/en/global-affairs/news/2017/11/minister_champagnewelcomesprogressonthecomprehensiveandprogressi.html).

78. *Exploratory discussions on a possible Canada-China free trade agreement*, GLOBAL AFFAIRS CANADA, <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fta-ale/background-contexte.aspx?lang=eng>.

79. *Exploratory discussions for a possible Canada-ASEAN free trade agreement*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/asean-anase/fta-ale/background-contexte.aspx?lang=eng>.

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forward with negotiations. Following a trip to Argentina in November of 2016 by Prime Minister Justin Trudeau, Canada initiated public consultations on a potential Canada-MERCOSUR agreement on April 29, 2017.<sup>80</sup>

On July 1, 2017, Canada's Agreement on Internal Trade (AIT) was replaced by a new internal trade agreement: the Canadian Free Trade Agreement (CFTA).<sup>81</sup> Like the AIT, the CFTA is an agreement among federal, provincial, and territorial governments that is intended to reduce and eliminate, to the greatest extent possible, barriers to the free movement of persons, goods, services and investment within Canada. While the AIT covered only those sectors that were specifically listed in the agreement, the CFTA makes use of the so-called "negative list approach," in that the agreement will cover all sectors, except for those that are specifically excluded. The types of measures that are specified in the CFTA as being subject to general exception are those concerning aboriginal peoples, national security, taxation, water, social services, tobacco control, language, culture, gambling and betting, collective marketing arrangements for agricultural goods, and passenger transportation services.

On May 18, 2017, the U.S. Trade Representative, Robert Lighthizer, notified the United States Congress of the Trump administration's intent to renegotiate the North American Free Trade Agreement (NAFTA).<sup>82</sup> The first round of negotiations was held in Washington, D.C. from August 16 through August 20, 2017.<sup>83</sup> There have been four subsequent rounds of negotiations, most recently on November 17th through 21st, with round six scheduled to be held in Montreal from January 23 through January 28, 2018.<sup>84</sup> The parties have agreed to continue talks through March of 2018.

Major differences in the NAFTA negotiations at present relate to U.S. demands that automobiles include fifty percent U.S. content and eighty-five percent NAFTA regional value content; Canadian tariffs on imports of dairy, poultry, and eggs be eliminated; an NAFTA provision for a five year "sunset clause" which would result in the automatic termination of NAFTA unless

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80. *Consulting Canadians on a possible Canada-MERCOSUR Free Trade Agreement*, GOVERNMENT OF CANADA, <http://www.international.gc.ca/trade-commerce/consultations/mercosur/index.aspx?lang=eng>.

81. Press Release, Government of Canada, Canadian Free Trade Agreement Finalized: New Interprovincial Agreement to Grow Canada's Economy (Apr. 7, 2017), <https://www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-news-release-1.pdf>.

82. Press Release, Office of the United States Trade Representative, USTR: Trump Administration Announces Intent to Renegotiate the North American Free Trade Agreement (May 18, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

83. Press Release, Office of the United States Trade Representative, USTR Announces First Round of NAFTA Negotiations (Jul. 19, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-announces-first-round-nafta>.

84. *Some NAFTA talks to get early Nov. 15 start in Mexico: sources*, REUTERS (Nov. 6, 2017) <https://www.reuters.com/article/us-trade-nafta/some-nafta-talks-to-get-early-nov-15-start-in-mexico-sources-idUSKBN1D701F?il=0>.

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all parties agree to renew it.<sup>85</sup> Among other things, Canada seeks to protect its supply-management system for dairy and poultry; expand market access for public procurement contracts in the US; and reform (not eliminate) the NAFTA Chapter 11, 19, and 20 dispute settlement processes.<sup>86</sup> Mexico's NAFTA priorities include enhanced labor mobility, environmental sustainability, streamlined customs procedures, the measures dealing with the digital economy, and the elimination of barriers to trade.<sup>87</sup>

On June 29, 2017, Canada was invited to become an associate member, by way of the establishment of an FTA – of the Pacific Alliance, comprising Chile, Colombia, Mexico, and Peru. Canada initiated public consultations on the potential agreement to be submitted by September 10, 2017.<sup>88</sup> A first round of official negotiations towards an FTA with the Pacific Alliance was held in Colombia from October 23 through October 27, 2017.<sup>89</sup>

Several investment protection agreements came into force this year. In particular, on February 24, 2017, the Canada-Mongolia Foreign Investment Promotion and Protection Agreement entered into force;<sup>90</sup> on March 27, 2017, the Canada-Guinea Foreign Investment Promotion and Protection Agreement entered into force,<sup>91</sup> and, on October 11, 2017, the Canada-

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85. Press Release, Office of the United States Trade Representative, USTR Releases NAFTA Negotiating Objectives (Jul. 17, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating>.

86. Press Release, Global Affairs Canada, Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA) (Aug. 14, 2017), [https://www.canada.ca/en/global-affairs/news/2017/08/address\\_by\\_foreignaffairsministeronthemodernizationofthenorthame.html](https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html).

87. Press Release, Embassy of Mexico in Cuba, The Secretariat of Economy of Mexico, Priorities of Mexico in the negotiations for the modernization of The North American Free Trade Agreement (Aug. 2, 2017), <https://embamex.sre.gob.mx/finlandia/images/pdf/TLCAN/Priorities-of-Mexico-NAFTA-negotiations.pdf>.

88. *Consulting Canadians on a possible Canada-Pacific Alliance Free Trade Agreement*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/trade-commerce/consultations/pacific-alliance-pacifique/index.aspx?lang=eng> (last visited Mar. 9, 2018).

89. News Release, Global Affairs Canada, Canada launches negotiations toward deepening its trade partnership with the Pacific Alliance (Oct. 22, 2017), [https://www.canada.ca/en/global-affairs/news/2017/10/canada\\_launches\\_negotiationstowarddeepeningitstradepartnershipwi.html](https://www.canada.ca/en/global-affairs/news/2017/10/canada_launches_negotiationstowarddeepeningitstradepartnershipwi.html).

90. Agreement Between Canada and Mongolia for the Promotion and Protection of Investments, Can.-Mong., Sept. 8, 2016; Bajar Scharaw, *Guest Post: Agreement between Canada and Mongolia for the Promotion and Protection of Investments – a Glance at Its Nature, Significance and Features*, UNIVERSITY OF BRITISH COLUMBIA (Dec. 10, 2017), <http://blogs.ubc.ca/mongolia/2017/canada-mongolia-fipa-investment/>.

91. Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea, Can.-Guinea, Mar. 27, 2017; *Trade and investment agreements*, GLOBAL AFFAIRS CANADA, [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&country\\_pays=Guinea&menu\\_id=152](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&country_pays=Guinea&menu_id=152) (under “filter options” enter “Guinea” in the “country, country grouping, or territory” selection box and select “filter”) (last visited Mar. 7, 2018).

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Burkina Faso Foreign Investment Promotion and Protection Agreement came into force.<sup>92</sup>

**B. CANADIAN ECONOMIC SANCTIONS AND EXPORT CONTROLS**

*1. Canada Removes Sanctions on Liberia and Côte d'Ivoire*

On April 13, 2017, Canada removed the economic sanctions previously imposed on Liberia<sup>93</sup> and Côte d'Ivoire<sup>94</sup> under the *United Nations Act* (UNA). By issuing regulations pursuant to the UNA, the federal government enacted into Canadian law legal sanctions adopted by the United Nations Security Council. For instance, through the United Nations Liberia Regulations, Canada implemented into Canadian law the United Nations Security Council resolution passed in response to former president Charles Taylor's support for the Revolutionary United Front in Sierra Leone. The United Nations Côte d'Ivoire Regulations, on the other hand, were issued in order to implement into Canadian law the sanctions imposed on Côte d'Ivoire by the United Nations Security Council in response to continued conflict in that country.

The United Nations Security Council terminated sanctions against Côte d'Ivoire and Liberia on April 28, 2016, and May 25, 2016, respectively, but the two corresponding UNA regulations were not repealed until April 13, 2017.<sup>95</sup>

*2. Amendments to the Syria SEMA Regulations*

In addition to the economic sanctions made pursuant to the UNA, Canada also imposes economic sanctions pursuant to the Special Economic Measures Act (SEMA). The federal government uses the SEMA to impose sanctions on foreign jurisdictions and persons, where the Canadian government is of the opinion that a grave breach of international peace and security has occurred or when Canada implements a decision of an international organization other than the United Nations.

Syria, one of the countries targeted by the SEMA, has been subject to sanctions pursuant to the Special Economic Measures (Syria) Regulations

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92. Canada-Burkina Faso Foreign Investment Promotion and Protection Agreement, Can.-Burk. Faso, Oct. 11, 2017; *Trade and investment agreements*, GLOBAL AFFAIRS CANADA, [https://www.international.gc.ca/trade-commerce/trade-agreements-ac...r-acc/index.aspx?lang=eng&country\\_pays=Burkina%20Faso&menu\\_id=144](https://www.international.gc.ca/trade-commerce/trade-agreements-ac...r-acc/index.aspx?lang=eng&country_pays=Burkina%20Faso&menu_id=144) (under "filter options" enter "Burkina Faso" in the "country, country grouping, or territory" selection box and select "filter") (last visited Mar. 7, 2018).

93. *Global Sanctions Related to Liberia*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/sanctions/countries-pays/liberia.aspx?lang=eng>.

94. *Canadian Sanctions Related to Co<sup>^</sup>te d'Ivoire (Ivory Coast)*, GLOBAL AFFAIRS CANADA, [http://www.international.gc.ca/sanctions/countries-pays/ivory\\_coast-cote\\_divoire.aspx?lang=eng](http://www.international.gc.ca/sanctions/countries-pays/ivory_coast-cote_divoire.aspx?lang=eng).

95. *Id.*; see also *Global Sanctions Related to Liberia*, *supra* note 93.

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since May 24, 2011.<sup>96</sup> The sanctions Canada imposed on Syria are quite comprehensive, and include a prohibition on the importation of any goods from Syria, with the exception of food. Also prohibited are exportations to Syria, or to any person in Syria, of (i) any goods or technical data that may be used in the monitoring of telecommunications, (ii) luxury goods, and (iii) certain specified chemicals and products. Investments in Syria, financial and related services, and dealings with designated persons and their property are also prohibited under the regulations.

The SEMA Syria regulations were amended twice in April of 2017: first on April 13, 2017, in order to remove the names of fifty-eight individuals and add the names of twenty-seven individuals associated with the Syrian government, and a second time on April 20, 2017, in order to add the names of five additional entities and seventeen individuals to the list of designated persons, in response to evidence connecting those persons to the use of chemical weapons in Syria.<sup>97</sup>

### 3. *Belarus Removed from the ACL*

The Area Control List (ACL), made pursuant to the Export and Import Permits Act (EIPA) is a list of countries against which the Canadian government has instituted a complete export prohibition. The export of any goods or technology to a country listed on the ACL is prohibited, absent prior authorization obtained in accordance with the EIPA.

The Canadian federal government announced on May 7, 2016, that Belarus – listed on the ACL since December 14, 2006 – would be removed from the ACL. The necessary regulatory process was not completed until June 20, 2017, leaving North Korea as the only country currently listed on the ACL.<sup>98</sup>

### 4. *New Sanctions Imposed on Venezuela*

On September 22, 2017, the Canadian government imposed an asset freeze on forty Venezuelans identified as key figures in the government of President Nicolas Maduro, pursuant to the Special Economic Measures (Venezuela) Regulations.<sup>99</sup>

Federally and provincially regulated financial institutions – including banks, authorized foreign bank branches, credit unions, trust and loan companies, insurers, securities dealers, and money services businesses – have an obligation to determine, on a continuing basis (which the Office of the

<sup>96.</sup> *Canadian Sanctions Related to Syria*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/sanctions/countries-pays/syria-syrie.aspx?lang=eng>.

<sup>97.</sup> *Id.*

<sup>98.</sup> Global Affairs Canada, Notice to Exporters No. 212 of Amendment to the Area Control List (removal of Belarus) (Jun. 30, 2017), <http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/212.aspx?lang=eng>.

<sup>99.</sup> *Canadian Sanctions Related to Venezuela*, GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/sanctions/countries-pays/venezuela.aspx?lang=eng>.

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Superintendent of Financial Institutions takes to mean at least weekly), whether they are in possession or control of property that is owned, held, or controlled by or on behalf of a designated person. Monthly reports as to whether they hold property of a designated person must be filed by these financial institutions with their principal regulator.

5. *Sergei Magnitsky Law Enters Into Force*

On October 18, 2017, the government of Canada enacted the Justice of Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) (SML).<sup>100</sup> The government has described the SML as part of an effort to provide Canada with the tools to “respond to cases of human rights violations and significant acts of corruption anywhere in the world.”<sup>101</sup> The first set of regulations made pursuant to the SML were introduced on November 3, 2017, through which the government imposed an asset freeze on a number of foreign nationals identified by the government as responsible for, or complicit in, significant corruption or gross violations of human rights.<sup>102</sup> Under the SML, regulated financial institutions in Canada have new screening and reporting obligations intended to ensure that they are not in possession of the assets of any persons targeted by the legislation. With the introduction of the SML, Canada has joined the ranks of the United States and the United Kingdom, which already have similar legislation in place.

C. CANADIAN JURISPRUDENCE

Canadian courts have disposed of several disputes relevant to the administration and enforcement of Canada’s customs and international trade laws since the publication of the 2017 Year In Review issue.

The Federal Court of Appeal confirmed the authority of the Minister of Foreign Affairs and International Trade to make import permit decisions in *Volpak Inc. Canada (Border Services Agency)*.<sup>103</sup> *Volpak* was an appeal of a Canadian International Trade Tribunal (CITT) decision, which dismissed an appeal from a re-determination of the Canada Border Services Agency (CBSA). The CBSA’s decision related to thousands of kilos of chicken imported from the U.S. that had been reclassified by the CBSA from tariff item No. 0207.13.19 (within access commitment), to tariff item No. 0207.13.92 (over access commitment). The CBSA reclassified the goods on

100. Press Release, Global Affairs Canada, Canada adopts Justice for Victims of Corrupt Foreign Officials Act (Oct. 18, 2017), [https://www.canada.ca/en/global-affairs/news/2017/10/canada\\_adopts\\_justiceforvictimsofcorruptforeignofficialsact0.html](https://www.canada.ca/en/global-affairs/news/2017/10/canada_adopts_justiceforvictimsofcorruptforeignofficialsact0.html).

101. *Id.*

102. Press Release, Global Affairs Canada, Canada imposes sanctions on individuals linked to human rights violations and corruption (Nov. 3, 2017), [https://www.canada.ca/en/global-affairs/news/2017/11/canada\\_imposes\\_sanctionsonindividualslinkedtohumanrightsviolatio.html](https://www.canada.ca/en/global-affairs/news/2017/11/canada_imposes_sanctionsonindividualslinkedtohumanrightsviolatio.html).

103. Federal Court of Appeal, *Volpak Inc. v. President of the Canada Border Servs. Agency*, 2017 FCA 72, ¶¶ 4, 5 (Can.).

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advice that the import permit originally issued under section 8.3 of the Export and Import Permits Act had been cancelled by the Minister. The CITT determined that the CBSA had no choice but to consider the fact that the permit under which the goods had been imported had been retroactively cancelled. The court was not persuaded that the CITT had committed any reviewable error, and dismissed Volpak's appeal.

In addition, two customs classification decisions, both commenced by Best Buy Canada Ltd., were notable. In *Best Buy Canada Ltd. v. Canada (Border Services Agency President)*,<sup>104</sup> the evidence showed that certain television support stands were tailored to the changing market for flat panel television. Therefore, the goods met the test of heading No. 85.29 as being "for use solely or principally with goods of heading No. 85.25 to 85.26" (rather than as furniture as claimed by the CBSA).

In *Best Buy Canada Ltd. v. Canada (Border Services Agency President)*,<sup>105</sup> the issue on appeal was whether or not certain flat panel televisions could be classified under tariff item No. 9948.00.00 as "articles for use in automatic data processing ("ADP") machines and units thereof." There, the evidence showed that, during the relevant time period, Canadians were taking advantage of multimedia capabilities and were connecting their televisions to computers, cable/satellite set top boxes, game consoles, personal/digital video records, DVD/Blu-ray players, and other devices. The CITT found that the goods were physically attached and functionally joined to one or more devices that qualified as host goods listed under tariff item No. 9948.00.00 and, therefore, qualified for duty relief under that tariff item. The CITT rejected the CBSA's argument that in order to be classified under this tariff item the goods must comply with paragraph 3(a) of the Imported Goods Records Regulations (requiring a signed end-use certificate).

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104. *Best Buy Canada Ltd. v. Canada (Border Services Agency President)*, [2017] C.I.T.T. No. 71.

105. *Best Buy Canada Ltd. v. Canada (Border Services Agency President)*, [2017] C.I.T.T. No. 30.

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