THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

Customs Law

Jean-Renee Broussard, Gabriel Arriaga Callejas, Cyndee Todgham Cherniak, Melanie A. Frank, Brandi B. Frederick, Lawrence M. Friedman, Gwendolyn Hassan, Andrew Hudson, Greg Kanargelidis, Daniel Kiselbach, Cynthia Y. Liu, Matt Nakachi, Mercedes Christina Ozcan, Kathleen M. Porter, Peter Quinter, Turenna Ramirez Ortiz, David Salkeld, Lauren M. Sigg, Donald J. Sorochan, Q.C., Maureen E. Thorson, Richard E.K. Truman, and Rogelio Cruz Vernet*

I. Introduction

This article summarizes important developments in 2012 in customs law, including U.S. judicial decisions, nominations and appointments, trade, legislative, and executive developments, and Canadian, Mexican, and Australian legal developments.[1]

* The committee editors of this year in review article were Brandi B. Frederick, The Frederick Firm, Birmingham, Alabama; Mercedes Christina Ozcan, McBreen & Kopko, Jericho, New York; Gwendolyn Hassan, Navistar, Inc., Lisle, Illinois; Cyndee Todgham Cherniak, LexSage Professional Corporation, Toronto, Ontario; Melanie A. Frank, Hughes Hubbard & Reed LLP, Washington, DC. The authors are all attorneys who specialize in international trade law. Jean-Renee Broussard, Akin Gump Strauss Hauer & Feld LLP, Washington, DC; Gabriel Arriaga Callejas, Arriaga Callejas Attorneys at Law; Cyndee Todgham Cherniak, LexSage Professional Corporation; Melanie A. Frank, Hughes Hubbard & Reed LLP; Brandi B. Frederick, The Frederick Firm; Lawrence M. Friedman, Barnes, Richardson & Colburn; Gwendolyn Hassan, Navistar, Inc.; Andrew Hudson, Hunt & Hunt; Gregory Kanargelidis, Blake, Cassels & Graydon LLP; Daniel Kiselbach, Miller Thomson LLP; Cynthia Y. Liu, Hughes Hubbard & Reed LLP; Matt Nakachi, Sandler, Travis & Rosenberg, P.A.; Mercedes Christina Ozcan, McBreen & Kopko; Kathleen M. Porter, Robinson & Cole LLP; Peter Quinter, Gray Robinson, P.A.; Turenna Ramirez Ortiz, Sánchez DeVanny; David Salkeld, Arent Fox LLP; Lauren M. Sigg, Robinson & Cole; Donald J. Sorochan, Q.C., Miller Thomson LLP; Maureen E. Thorson, Wiley Rein LLP; Richard E.K. Truman, Miller Thomson LLP; Rogelio Cruz Vernet, Basham, Ringe, and Correa S.C.

1. For developments during 2011, see Aaron Besser et al., *Customs Law*, 46 Int'l Law. 5 (2012). For developments during 2010, see Yohai Baisburd et al., *Customs Law*, 45 Int'l Law. 3 (2011).

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

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

A. Nominations and Appointments

In 2012, President Obama nominated Mark Barnett to fill a vacancy at the U.S. Court of International Trade (CIT)[2] when Judge Evan Wallach was sworn in at the Federal Circuit Court of Appeals.[3] In November 2012, President Obama nominated Brooklyn Law School professor Claire Kelly to fill the vacancy on the CIT resulting from Judge Judith Barzilay's taking senior status in June 2011.[4]

B. United States Court of Appeals Cases

1. *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*[5]

The Convention on Cultural Property Implementation Act[6] (CPIA) permits foreign governments (State Parties) to request that the United States prohibit the unauthorized importation of culturally significant items[7] to prevent looting and illegal sale of such artifacts. To be eligible for protection, the object must be "archaeological or ethnological material of the State Party."[8] Importation of protected objects is permitted if it is licensed by the home country,[9] or if other conditions are met.[10]

U.S. Customs and Border Patrol (CBP) seized ancient coins from Cyprus and China. The Guild raised three main arguments: (1) the extension of import restrictions to the coins in question was ultra vires; (2) the coins were not subject to seizure until the government shows that they were first discovered within and subject to export controls by the home State Party[11]; and (3) a technical argument under the Administrative Procedure Act claiming that the decision to protect these coins was arbitrary and capricious and was based on prejudgment and ex parte communications.[12] The court rejected all of these arguments and upheld the seizure as proper. In a separate statutory forfeiture proceeding, the Guild can challenge the notice and classification of the coins and otherwise demonstrate the coins are not subject to forfeiture. On appeal, the court noted CPIA involves a

2. Press Release, The White House, Office of the Press Sec'y, President Obama Nominates Mark A. Barnett to Serve on the U.S. Court of International Trade (July 12, 2012), http://www.whitehouse.gov/the-press-office/2012/07/12/president-obama-nominates-mark-barnett-serve-us-court-international-trad.

3. *Judge Evan J. Wallach Sworn in as Federal Circuit Judge on Friday, November 18, 2011*, U.S. Ct. Appeals for Fed. Circuit, http://www.cafc.uscourts.gov/2011/evan-j-wallach-sworn-in-as-federal-circuit-judge-on-friday-november-18-2011.html (last visited Feb. 13, 2013).

4. Press Release, The White House, Office of the Press Sec'y, President Obama Nominates Claire R. Kelly to Serve on the U.S. Court of International Trade (Nov. 14, 2012), http://www.whitehouse.gov/the-press-office/2012/11/14/president-obama-nominates-claire-r-kelly-serve-us-court-international-tr.

5. *See* Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., 698 F.3d 171 (4th Cir. 2012).

6. Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-13 (2006).

7. *See id.* § 2602.

8. For the definition of "archaeological or ethnological material of the State Party," see 19 U.S.C. § 2601(2).

9. *See id.* § 2606(a).

10. *See id.* § 2606(c)(1)-(2).

11. *See Ancient Coin Collectors Guild*, 698 F.3d at 179-81.

12. *See id.* at 183.

sensitive area of foreign relations in which Congress delegated authority to the President, who exercises that authority through the State Department. Thus, the court declined to review the policy decisions behind the imposition of these restrictions.[13]

2. *Sioux Honey Association v. Hartford Fire Insurance Co.*[14]

The Federal Circuit affirmed the CIT's dismissal of a class action against the United States and several insurers who had issued customs bonds guaranteeing the payment of anti-dumping duties on goods imported from China. In 2009, domestic honey, mushroom, crawfish, and garlic producers filed a class action suit in the CIT against the United States, the Department of Commerce, CBP, and a number of insurers. The complaint alleged that the sureties issued customs bonds guaranteeing payment of anti-dumping duties the United States assessed on imports of honey, mushrooms, crawfish, and garlic originating from China. Many of the importers had defaulted on payment of the assessed anti-dumping duties. The plaintiff domestic producers argued the sureties wrongfully refused to pay the United States under these defaulted bonds and the United States neglected to collect the anti-dumping duties from the sureties, a portion of which would have been paid to the domestic producers. In 2010, the CIT dismissed the producer's claims against the sureties because it found the anti-dumping statute and regulations did not intend "to create rights in any private party or confer a benefit upon a private party."[15] Subsequently, CIT also dismissed the claims against the government. The Federal Circuit affirmed, though with different reasoning, finding the CIT lacked supplemental jurisdiction over claims against the sureties and that the domestic producers lacked enforcement rights under the bonds.

3. *Aromont USA, Inc. v. United States*[16]

The Federal Circuit, acting de novo, affirmed the CIT's summary judgment in favor of Aromont in a case considering whether Aromont's imported flavoring products from France were principally used as soups or broths[17] or if they were used for a variety of purposes.[18] The answer would determine the proper classification of these products under the Harmonized Tariff Schedule of the United States (HTSUS), and thus the applicable ad valorem tax. The court rejected the government's position and found that the products had no principal use and could be used for a variety of purposes and should be classified under HTSUS Heading 2106 with its lower ad valorem tax rate. In its analysis, the court applied the *Carborundum*[19] Factors.

---

13. *See id.* at 185. For further discussion of this case, *see* Patty Gerstenblith, *International Art and Cultural Heritage*, 1 ABA/SIL YIR (n.s.) — (2013).

14. *See* Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041 (Fed. Cir. 2012).

15. *See* Sioux Honey Ass'n v. Hartford Fire Ins. Co., 700 F. Supp. 2d 1330, 48 (Ct. Int'l Trade 2010) (citing 19 C.F.R. § 113.62(a)(1)(i)-(ii) (2012)).

16. *See* Aromont USA, Inc. v. United States, 671 F.3d 1310 (Fed. Cir. 2012).

17. *See id.* at 1311 ("under HTSUS subheading 2104.10.00").

18. *See id.* ("under HTSUS subheading 2106.90.99").

19. *See id.* at 1313 (including: "use in the same manner as merchandise which defines the class; the general physical characteristics of the merchandise; the economic practicality of so using the import; the expectation of the ultimate purchasers; the channels of trade in which the merchandise moves; the environment of the sale, such as accompanying accessories and the manner in which the merchandise is advertised and displayed;

4. *Hitachi Home Electronics (America), Inc. v. United States*[20] *and Norman G. Jensen, Inc. v. United States*[21]

The courts in *Hitachi* and *Jensen* confronted the statutory time limitations set forth in 19 U.S.C. § 1515(a)[22] together with the provision in § 1515(b) concerning accelerated disposition of a protest.[23] In both cases, the plaintiffs sought jurisdiction in the CIT under 28 U.S.C. § 1581(i) for protests that had not been decided by CBP within the two-year period. In each case, and for slightly different reasons, the plaintiff did not wish to seek accelerated disposition of the protests, but rather sought enforcement of the statutory language requiring that the CBP render a decision within two years.

Hitachi argued jurisdiction should be allowed under § 1581(i) because the underlying protests would have been deemed granted by operation of law when CBP failed to act within the two-year period required by § 1515(a).[24] In contrast, Jensen artfully framed its action in terms of a Writ of Mandamus that would require an administrative decision to be rendered by CBP within the two-year timeframe.

In both cases, the Federal Circuit affirmed the CIT's holdings that jurisdiction would fail under § 1581(i) because jurisdiction could have been sought under § 1581(a) vis-à-vis a request for accelerated disposition under 19 U.S.C. § 1515(b). The *Hitachi* decision drew a sharp dissent from Judge Reyna, and both decisions created discussion within the trade community.

C. U.S. Court of International Trade Cases

1. *United States v. Robert E. Landweer & Co.*[25] *and United States v. Nitek Electronics, Inc.*[26]

In these two cases, the CIT dismissed CBP penalty actions where the United States failed to exhaust administrative remedies before filing suit. In both *Landweer* and *Nitek*, the CPB filed penalty actions against a broker and importer in conjunction with the entry of goods subject to antidumping duty orders. The court rejected defendants' arguments that the court lacked subject matter jurisdiction by reason of CPB's failure to exhaust administrative remedies for penalty actions against brokers[27] and penalties for fraud, gross

---

and the recognition in the trade of this use.") (citing United States v. Carborundum Co., 536 F.2d 373, 377 (C.C.P.A. 1976)).

20. 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010), *aff'd*, 661 F.3d 1343 (Fed. Cir. 2011), *reh'g en banc denied*, 676 F.3d 1041 (2012).

21. *See* Hitachi Home Elecs. (Am.), Inc. v. United States, 704 F. Supp. 2d 1315 (Ct. Int'l Trade 2010), *aff'd*, 661 F.3d 1343 (Fed. Cir. 2011), *reh'g en banc denied*, 676 F.3d 1041 (2012).

22. *See* Norman G. Jensen, Inc. v. United States, No. 10-00115, 2011 WL 587174 (Ct. Int'l Trade Feb. 10, 2011), *aff'd*, 687 F.3d 1325 (Fed. Cir. 2012).

23. *See id.* § 1515(b) ("For purposes of section 1581 of Title 28, a protest which has not been allowed or denied . . . within thirty days . . . of a request for accelerated disposition shall be deemed denied on the thirtieth day . . . .").

24. *See Hitachi Home Elecs. (Am.), Inc.*, 704 F. Supp. 2d at 1318.

25. *See* Robert E. Landweer & Co. v. United States, 816 F. Supp. 2d 1364 (Ct. Int'l Trade 2012).

26. *See* United States v. Nitek Elecs., Inc., 844 F. Supp. 2d 1298 (Ct. Int'l Trade 2012).

27. *See* 19 U.S.C. § 1641(d) (2012).

negligence, and negligence[28] before commencing suit, finding the statutory requirements were not jurisdictional.[29] But the court stated that where statutory requirements are "non-jurisdictional, the exhaustion requirement is treated as an element of the underlying claim."[30] The court reasoned that the statutory administrative processes were "designed to give an importer the opportunity to fully resolve a penalty proceeding before Customs, before any action in this Court,"[31] such that CBP's failure to adhere to these processes left the agency without a claim upon which relief could be granted.[32] The court further stated statutory administrative requirements must be applied strictly.

In *Nitek*, this led the court to dismiss CBP's negligence claim, despite the fact that the agency administratively perfected a claim against the defendant for gross negligence, which has a higher standard of culpability, stating the statute required notice to the defendant of a "different (even lower) level of culpability."[33] The court also noted that exhaustion requirements for the imposition of penalties, below, do not apply to recovery of lost duties, and refused to dismiss the United States' claim for lost duties.[34] Upon reconsideration, the court confirmed the dismissal of the penalty claim in the absence of exhaustion.[35]

2. *PRP Trading Corp. v. United States*[36]

In PRP Trading Corp., the CIT examined its jurisdiction over an importer's challenge to goods seized by CBP. Between December 2011 and January 2012, the plaintiff imported five entries of aluminum extrusions from Malaysia to Puerto Rico. The entries were initially detained on suspicion that the country of origin marking was false. Subsequently, CBP seized three of the entries, and (based on CBP's failure to act), the remaining two entries were deemed excluded. PRP sued in the CIT, alleging that CBP improperly excluded the five aluminum extrusion entries. The CIT, however, granted the government's motion to dismiss based on lack of jurisdiction. In dismissing the case, the CIT explained that seizure of merchandise before the commencement of an action in the CIT vests jurisdiction over subsequent claims in U.S. District Courts (rather than the CIT). The CIT suggested that PRP Trading Corporation re-file its case in U.S. District Court.

28. *See id.* § 1592.

29. *See Landweer*, 816 F. Supp. 2d at 1372; *Nitek Elecs., Inc.*, 844 F. Supp. 2d. at 1303.

30. *See Landweer*, 816 F. Supp. 2d at 1369; *Nitek Elecs., Inc.*, 844 F. Supp. 2d. at 1307-08.

31. *Landweer*, 816 F. Supp. 2d at 1375 (quoting United States v. Optrex Am., Inc., 29 C.I.T. 1494, 1500 (Ct. Int'l Trade 2005)).

32. *See Landweer*, 816 F. Supp. 2d at 1375.

33. *Nitek Elecs., Inc.*, 844 F. Supp. 2d. at 1307; *see also* 19 U.S.C. § 1592(b)(1)(A)(v) (requiring the notice to "state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence").

34. *See Nitek Elecs., Inc.*, 844 F. Supp. 2d at 1309.

35. *See* United States v. Nitek Elecs., No. 11-00078, 2012 WL 3195084 (Ct. Int'l Trade Aug. 7, 2012).

36. *See* PRP Trading Corp. v. United States, No. 12-00103, 2012 WL 4513223 (Ct. Int'l Trade Oct. 2, 2012).

3. *United States v. Active Frontier International, Inc.*[37]

The United States filed suit seeking to recover $80,596 in civil penalties under § 1592 of the Tariff Act of 1930.[38] After the clerk entered the importer's (AFI) default for failure to appear or otherwise defend, the United States applied for a judgment by default. The CIT considered whether the complaint presented well-pled facts from which the court could conclude the importer entered merchandise by means of statements that were "material and false."[39] The complaint alleged that AFI falsely declared the country of origin for apparel in seven entries in 2006 and 2007, submitted to the CBP by bills of lading, entry summaries, and other entry documents stating the articles were manufactured in Indonesia, Korea, or the Philippines, and that the violations alleged did not affect the assessment of duties.[40] The court determined the allegations did not sufficiently allege the false declarations were "material" and denied the application for default judgment.

The court held that there was no binding authority for the proposition that any false statement of country of origin made upon entry of merchandise is per se material for purposes of § 1592, and thus CBP's allegation that false origin statements affected CBP's determinations as to the origin of merchandise circular and conclusory.[41] The CIT declined to adopt CBP's broad definition of "material" in its Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. § 1592.[42] The CIT concluded that the definition of "material" adopted by Customs' Penalty Guidelines was unpersuasive and was at odds with and reached well beyond the statutory purpose of § 1592, because it would subject an importer to a penalty for any negligently made origin statement, even if it had "no potential to affect a determination made under any law pertaining to the imported merchandise."[43]

4. *Del Monte Corp. v. United States*[44]

The CIT granted summary judgment in favor of the government on both counts of the complaint involving the classification and valuation of a variety of seasoned pouched tuna products imported from Thailand. The first issue was the proper calculation of value of the goods. The producer initially overcharged Del Monte due to understating the percentage of tuna recovered for use, but a correction resulted in a refund. The court held the value of the shipment should have included the refund, finding it was not a rebate based on the contract, despite that the refund was made post importation. As to the second issue of whether the tuna was packed in oil, and if so, subject to a lower tax, the court found that after the tuna was processed and pouched, and just before sealing the pouch, the producer added various sauces or other seasonings to the tuna, which in some varieties

37. United States v. Active Frontier Int'l, Inc., 867 F. Supp. 2d 1312 (Ct. Int'l Trade 2012).

38. *Id.* at 1314; *see* 19 U.S.C. § 1592 (2006).

39. *Id.* at 1315-16; 19 U.S.C. § 1592(a)(1)(A)(i).

40. *Active Frontier Int'l*, 867 F. Supp. 2d at 1314.

41. *Id.* at 1316-17.

42. *Id.* at 1317; *see* Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 U.S.C. 1592, 19 C.F.R. § 171 app. B, at (B) (2006).

43. *Active Frontier Int'l*, 867 F. Supp. 2d at 1318.

44. Del Monte Corp. v. United States, No. 07-00109, 2012 WL 5234288 (Ct. Int'l Trade Oct. 12, 2012).

contained a small percentage of oil. For this reason, the court determined that the tuna was not packed in oil.

III. Legislative and Executive Branch Policy Updates

A. "Centers of Excellence and Expertise"

In mid-2012, CBP initiated a test to develop its new industry-specific Centers of Excellence and Expertise (CEE).[45] By the end of 2012, four CEEs were in operation, covering electronics, pharmaceutical, petroleum, and automotive and aerospace products,[46] and importers were able to join the program.[47] CBP then announced plans to add six additional CEEs in 2013, covering agricultural, apparel and footwear, base metals, consumer products, industrial and manufacturing, and machinery products.[48] CBP further indicated it would give priority to members of the Importer Self-Assessment Program who are Tier 2 or Tier 3 C-TPAT certified.[49]

During the initial pilot, the existing four CEEs will maintain offices at four ports of entry, but will act as a single point of contact for processing all entries of the CEE members.[50] Effective October 12, 2012, and for the next three years, CBP will transfer authority from Port Directors to the four CEE Directors to issue, inter alia, Requests for Information, Notices of Action, and decisions on post importation NAFTA claims for CEE members' entries.[51] CEE members will also need to file prior disclosures with CEE rather than respective ports of entry.[52]

B. ACE / Simplified Entry Pilot Program

In 2012, CBP made important advancements in its roll-out of the Automated Commercial Environment (ACE). ACE was envisioned as the central EDI point for CBP and other agencies as part of the International Trade Data System (ITDS).[53] The ACE Portal is an interactive, on-line tool that provides a single gateway to CBP information. Importers and brokers can create a broad range of customizable reports to handle online billing,

45. Announcement of Test Providing Centralized Decision-Making Authority for Four CBP Centers of Excellence and Expertise, 77 Fed. Reg. 52,048, 52,048 (Aug. 28, 2012).

46. *Id.*

47. *Id.* at 52,050.

48. U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec., Centers of Excellence and Expertise Overview 9 (2012), *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_transformation/industry_int/cee_overview.ctt/cee_overview.pdf.

49. U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec., Centers of Excellence and Expertise Frequently Asked Questions 1 (2012), *available at* http://www.cbp.gov/linkhandler/cgov/trade/trade_transformation/industry_int/cee_faq.ctt/cee_faq.pdf.

50. *Id.* at 2.

51. Announcement of Test Providing Centralized Decision-Making Authority for Four CBP Centers of Excellence and Expertise, 77 Fed. Reg. at 52,049.

52. *Id.*

53. U.S. Customs & Border Prot., U.S. Dep't of Homeland Sec., Automated Commercial Environment (ACE) Capabilities (2012), *available at* http://www.cbp.gov/linkhandler/cgov/newsroom/fact_sheets/trade/ace_factsheets/ace_deployed_fs.ctt/ace_deployed_fs.pdf [hereinafter ACE Capabilities].

respond to CBP Requests for Information, Notices of Action, and Demands for Redelivery.[54]

As part of the cargo release phase of ACE, CBP started a pilot program for "Simplified Entry" processes in the air mode. The pilot allows earlier entry filing for certain types of entries and corrections to be made until filing of the entry.[55] A new Post Summary Corrections (PSC) process also replaced the existing hardcopy process, and now allows corrections to be made electronically. Additionally, as of September 29, 2012, ACE e-Manifest is the only approved EDI for transmitting required advance rail and sea cargo information and ABI in-bond transactions to CBP.[56]

C. Interagency Trade Enforcement Center

On February 28, 2012, President Obama created a new task force, the Interagency Trade Enforcement Center (ITEC), that is staffed by representatives from the Office of the U.S. Trade Representative (USTR), CBP, and several other agencies within the U.S. Government.[57] The mission of ITEC is to robustly monitor and enforce domestic trade laws and to enhance market access for U.S. exporters.[58] Informally, the new Director of ITEC stated the team will respond to complaints by U.S. industries, conduct its own studies, intellectual property and other trade investigations overseas, and will provide its findings to U.S. industry and to the Departments of Commerce and Customs for use in trade remedy investigations.

D. Increase to the Informal Entry Limit

On December 6, 2012, CBP published a final rule amending the definition of an "informal entry" to increase the value limit from $2,000 to $2,500.[59] Prior to the change, any imported merchandise valued over $2,000 was treated as a formal entry and required importers to provide a surety bond, complete CBP Form 7501, and pay a minimum $25 Merchandise Processing Fee (MPF).[60] It is expected that the increased threshold will save importers significant costs associated with bond processing and payment of MPFs.

---

54. *Id.*

55. National Customs Automation Program Test Concerning Automated Commercial Environment (ACE) Simplified Entry, 76 Fed. Reg. 69,755, 69,755 (Nov. 9, 2011). On August 14, 2012, CBP published a Federal Register Notice announcing the expansion of the pilot test of Cargo Release/Simplified Entry to additional participants. *See* National Customs Automation Program (NCAP) Test Concerning Automated Commercial Environment (ACE) Simplified Entry: Modification of Participant Selection Criteria and Application Process, 77 Fed. Reg. 48,527, 48,527 (Aug. 14, 2012).

56. Ace Capabilities, *supra* note 53.

57. Press Release, The White House, Executive Order—Establishment of the Interagency Trade Enforcement Center (Feb. 28, 2012), http://www.whitehouse.gov/the-press-office/2012/02/28/executive-order-establishment-interagency-trade-enforcement-center.

58. *Id.*

59. Informal Entry Limit and Removal of a Formal Entry Requirement, 77 Fed. Reg. 72,715, 72,715 (Dec. 6, 2012) (to be codified at 19 C.F.R. § 10).

60. *Id.*

E. Formula-Based Transfer Pricing and Post-Importation Adjustments

On May 30, 2012, CBP issued Headquarters Ruling Letter (HRL) W548314, which revoked a prior CBP Headquarters ruling (and thus changing its position) concerning the treatment of post-import adjustments made pursuant to an objective formula specified in the importer's formal transfer pricing policies.[61] HRL W548314 provides that, when determining the appropriate customs value under the transaction value method,[62] an importer may rely on a formula-based transfer pricing policy if it was in place before importation. Accordingly, the importer may consider any post-importation adjustments to the price that are pursuant to the importer's transfer pricing policy, if the transfer pricing policy meets certain outlined criteria.[63] As a result of this ruling, both upward and downward post-importation adjustments to related-party sales prices are allowed. But the importer must continue to demonstrate that the so-called "circumstances of sale" test is met for related-party pricing before the adjustments will be recognized as part of the transaction value "formula."[64]

IV. Trade Promotion and Other Legislative Branch Developments

A. The United States-Columbia Trade Promotion Agreement (CTPA)

The CTPA entered into force on May 15, 2012,[65] almost five years after it was signed on November 22, 2006.[66] The delay was due in part to the "Columbian Action Plan Related to Labor Rights" agreed upon by the U.S. and Colombian governments specifying steps the Colombian government needed to take to protect union workers and improve workers' rights.[67] Under the CTPA, 80 percent of duties on U.S. exports of consumer and industrial products were eliminated immediately.[68] An additional 7 percent of U.S. exports will receive duty-free treatment within five years, and most remaining duties will be eliminated over the next ten years.[69] Duties and quotas on textiles and apparel items meeting the agreement's rules-of-origin provisions were eliminated immediately. Tariffs and quotas on agricultural products will be phased out over time, ranging from three to nineteen years depending on the product.[70] The CTPA is expected to boost U.S. exports by $1.1 billion.[71]

---

61. *Notice of Revocation of a Ruling Letter HQ 547654*, 46 Cust. B. & Dec. 23 (2012) [hereinafter *HQ 547654*]. The ruling was effective sixty days thereafter on July 30, 2012. *Id.*

62. *See* 19 C.F.R. § 152.103(a)(1) (2012) (determining value under the transaction value method).

63. *HQ 547654*, *supra* note 61, at 2.

64. *See* 19 C.F.R. § 152.103(a)(l).

65. M. Angeles Villarreal, Cong. Research Serv., RL 34470, The U.S.-Colombia Free Trade Agreement: Background and Issues 1 (2012).

66. *Id.*

67. *Id.*

68. Office of the U.S. Trade Representative, *Final Text of the U.S.-Columbia Trade Promotion Agreement (CPTA)*, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (last visited Feb. 10, 2013).

69. *Id.*

70. *Id.*

71. *Id.*

B. The United States-Panama Trade Promotion Agreement (PTPA)

The PTPA entered into force on October 31, 2012.[72] The PTPA was approved by Congress on October 12, 2011, and signed into law on October 21, 2011.[73] Before the PTPA, U.S. exports to Panama faced tariffs of up to 260 percent, while most of Panama's exports to the United States were duty free.[74] Under the agreement, over 87 percent of U.S. exports of consumer and industrial products to Panama became duty-free immediately, with the remaining tariffs phased out over a period of ten years.[75]

C. The United States-Korea Free Trade Agreement (KFTA)

The KFTA entered into force on March 15, 2012, almost five years after the agreement was signed.[76] "Under the KFTA, almost eighty percent of U.S. exports to Korea of consumer and industrial products" became duty-free immediately, and "nearly ninety-five percent of bilateral trade in consumer and industrial products will become duty free within five years" while "most remaining tariffs will be eliminated within ten years."[77] The agreement also contains a number of provisions unrelated to tariffs, namely strengthened provisions for intellectual property rights benefiting U.S. inventors, enhanced regulatory transparency, and motor vehicle safety and environmental standards.[78] Once fully implemented, the KFTA is expected to boost U.S. exports to Korea by U.S. $10-11 billion.[79]

D. Russia and Moldova Jackson-Vanik Repeal Act of 2012[80]

The U.S. House of Representatives passed the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 (H.R. 6156) on November 16, 2012, by a vote of 365-43.[81] This legislation would establish permanent normal trade relations (PNTR) with Russia by repealing the Cold War-era Jackson-Vanik Amendment,[82] which added Russia to the list of former communist countries denied fa-

72. Office of the U.S. Trade Representative, *Overview of the U.S.-Panama Trade Agreement*, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text (last visited Feb. 10, 2013).

73. *Id.*

74. Office of the U.S. Trade Representative, *Benefits of the U.S.–Panama Trade Promotion Agreement*, USTR, http://www.whitehouse.gov/sites/default/files/panama_trade_agreement_benefits.pdf (last visited Feb. 10, 2013).

75. *Id.*

76. *See* Office of the U.S. Trade Representative, *Final Text of the U.S.–South Korea Trade Promotion Agreement*, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Feb. 10, 2013) [hereinafter U.S.–Korea Free Trade Agreement].

77. *See* Office of the U.S. Trade Representative, KORUS FTA: Chapter Two: National Treatment and Market Access for Goods 2-13 (2012), *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file904_12701.pdf; Office of the U.S. Trade Representative, *U.S.–Korea Free Trade Agreement: New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta (last visited Feb. 10, 2013).

78. *See* U.S.-Korea Free Trade Agreement, *supra* note 76.

79. Office of the U.S. Trade Representative, *Discover New Opportunities for Made in America Exports*, USTR, http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited Feb. 10, 2013).

80. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, H.R. 6156, 112th Cong. (2012).

81. *Id.*

82. *Id.*

vored trade status due to human rights concerns.[83] The legislation includes provisions to punish Russians implicated in human rights abuses, through denial and revocation of U.S. Visas and seizure of U.S. assets.[84] The Senate acted favorably on the legislation in early December, and President Obama granted Russia PNTR status on December 21, 2012. As a result, U.S. companies should benefit from lower tariffs, better protections for intellectual property, and the ability to bring disputes to the WTO. Currently, U.S. exports of goods and services to Russia total U.S. $11 billion per year.[85] If trade relations are normalized, economists predict that this number will double within five years.[86]

E. "Enforce Act" - AD/CVD Circumvention Investigations at Customs

In late 2011 and 2012, the House and Senate introduced several similar bills that would establish an extensive investigation process at CBP for targeting imports being "transshipped" through a third country to avoid payment of AD or CVD duties. By the end of 2012, one of the Senate bills, "The Enforcing Orders and Reducing Customs Evasion Act of 2012" (S. 3524, called "the Enforce Act"), moved forward for a full vote by the Senate.[87]

If enacted, U.S. domestic manufacturers would have a process for filing petitions with CBP claiming evasion of AD/CVD orders and CBP would be required to initiate investigations against properly filed allegations. The investigation process would resemble the AD/CVD investigations currently conducted by CBP, except that importers, rather than foreign producers, would be targets of the investigations. The rules would also include rapid response timelines, with only ninety days for CBP to complete its preliminary investigation. Therefore, both CBP and importers would have extremely short notice to gather necessary information and develop an investigative record. An affirmative finding of circumvention would result in retroactive collection of duties on imports previously entered.

Separately, the House introduced the "Preventing Recurring Trade Evasion and Circumvention Act" (H.R. 5708, referred to as "the Protect Act") that would establish a new "Trade Remedy Law Enforcement Division" at CBP dedicated specifically to conducting new circumvention investigations.[88] The legislation would also provide for cooperation with foreign countries to track and target goods that may be evading AD/CVD duties.

F. Application of CVDs to Non-Market Economies

On March 13, 2012, President Obama signed H.R. 4105,[89] which authorized CVDs to be applied to subsidized goods from nonmarket economies (NMEs) and provided that AD duties could be adjusted when applied to NME goods subject to countervailing duties.[90]

---

83. 19 U.S.C. § 2432 (repealed 2012).

84. H.R. 6156.

85. *Russian Trade*, *Human Rights Bill Heads to Obama*, USA TODAY (Dec. 6, 2012, 4:23 PM), http://www.usatoday.com/story/money/business/2012/12/06/russian-trade-obama-mccain/1751689/.

86. *Id.*

87. S. 3524, 112th Cong. (2012).

88. H.R. 5708, 112th Cong. (2012).

89. H.R. Con. Res. 4105, 112th Cong., 126 Stat. 265 (2012).

90. Press Release, The White House, Statement by the Press Secretary on H.R. 4105 (Mar. 13, 2012), http://www.whitehouse.gov/the-press-office/2012/03/13/statement-press-secretary-hr-4105.

The legislation authorizes CVDs to be retroactively applied on NME merchandise in all CVD proceedings initiated on or after November 20, 2006.[91] This provision abrogated the Federal Circuit's December 2011 *GPX International Tire Corp. v. United States* decision holding that Congress had legislatively ratified earlier agency and judicial interpretations that CVD law did not apply to NMEs and that, as a result, CBP could no longer interpret the Tariff Act of 1930 as providing such authority.[92]

The legislation also purports to address "double-counting" that occurs when both AD and CVD orders are imposed on the same NME good and subsidization is captured both by the CVD and AD margin based on the higher normal value adopted when using the surrogate country methodology.[93] Specifically, the legislation amends 19 U.S.C §1671(f)(1) of the AD law to require Commerce to reduce an AD duty imposed on NME merchandise calculated using the surrogate-based normal value in cases where: (1) a countervailable subsidy has been provided for the merchandise at issue; (2) the subsidy has reduced the average price of imports of that merchandise during the relevant period; and (3) commerce can "reasonably estimate" the extent to which the subsidy, in combination with the use of the surrogate-based normal value, has increased the weighted average dumping margin for such merchandise.[94] This double-counting provision applies prospectively and aims to bring the United States in compliance with the March 2011 WTO Appellate Body decision relating to imposition of CVDs against Chinese imports.[95] GPX International Tire Co. and several other Chinese companies are challenging the constitutionality of the legislation before the CIT.[96]

V. Canadian Legal Developments

A. Beyond the Border Action Plan

In 2012, Canada and the United States continued to work on the "Beyond the Border Action Plan" (Action Plan).[97] The Action Plan sets ambitious objectives and aggressive milestones extending into 2014. The Action Plan includes two broad areas of coopera-

91. Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112-99, § 1, 126 Stat. 265, 265 (2012).

92. GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011), *reh'g granted*, 678 F.3d 1308 (Fed. Cir. 2012).

93. Jeanne J. Grimmett, Cong. Research Serv., RL 33796, U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview 31 (2012).

94. *See GPX Int'l Tire Corp.*, 666 F.3d at 734-35.

95. Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

96. *Panama FTA*, *GOES WTO Report*, *GPX Legal Brief*, *USTR Africa Trip*, Inside U.S. Trade (Oct. 15, 2012), http://insidetrade.com/WTO-Daily-News/This-Week-In-Trade/panama-fta-goes-wto-report-gpx-legal-brief-ustr-africa-trip/menu-id-949.html. *See also Presidential Showdown*, *Election Fallout*, *Solar Case*, *Services Talks*, Inside U.S. Trade (Nov. 5, 2012), http://insidetrade.com/WTO-Daily-News/This-Week-In-Trade/presidential-showdown-election-fallout-solar-case-services-talks/menu-id-949.html.

97. Exec. Office of the President, Declaration by President Obama and Prime Minister Harper of Canada: United States – Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness (2011), *available at* http://www.dhs.gov/xlibrary/assets/wh/us-canada-btb-action-plan.pdf.

tion: perimeter security and economic competitiveness,[98] and regulatory cooperation.[99] There are some thirty-two initiatives to undertake. The Action Plan is divided into five parts, each of which focuses on distinct areas of cooperation, including addressing threats early, trade facilitation, cross-border law enforcement, critical infrastructure and cyber security, and the creation of an executive steering committee.

B. Regulatory Cooperation Council (RCC)

The RCC will work to align regulatory approaches over the next two years. RCC will strive to design new regulations with the goal of achieving the greatest extent of regulatory alignment, while recognizing that each country will maintain its own sovereign regulation. The work of RCC will focus on the following broad regulatory areas: agriculture and food, transportation, health and personal care products, workplace chemicals, and the environment.

C. NEXUS Appeals

Canada and the United States have implemented the NEXUS program to speed up custom clearance of trusted individual travelers. An individual with a NEXUS pass may use automated kiosks at airports and NEXUS only lanes at border crossings, enabling travelers to spend less time in customs lines.

When a NEXUS pass holder commits a customs, immigration, food and drug, or other border infraction, the Canada Border Services Agency officer or U.S. CBP officer may take away the NEXUS pass and undertake enforcement action for the infraction. Some of the infractions resulting in confiscation of a NEXUS pass in 2012 include:

- A traveler had an apple or a chocolate bar or Cuban cigar at the time they precleared U.S. Customs at a Canadian airport;
- A traveler bought a suitcase in China, previously declared it and did not declare it again when returning to Canada from a business trip;
- A traveler within her Canadian exemption limit incorrectly added the receipts;
- A traveler forgot to include in his Customs Declaration goods that were being shipped separately;
- A traveler made an error on his handwritten Declaration Card after properly using the automated kiosk and being selected for a random secondary search;
- A traveler bought a gift for a friend in the United States, gave the gift to the friend in the United States, and kept the receipt, which was discovered during a secondary search;
- A traveler within his Canadian exemption limit used an incorrect exchange rate undervaluing goods by less than $50; and
- A traveler declared she was over her Canadian exemption limit and declared the value for duty in a foreign currency.

98. The Gov't of Can., United States – Canada Beyond the Border: A Shared Vision for Perimeter Security and Economic Competitiveness (2011), *available at* http://actionplan.gc.ca/grfx/psec-scep/pdfs/bap_report-paf_rapport-eng-dec2011.pdf.

99. *See* The Gov't of Can., Perimeter Security and Economic Competitiveness: Action Plan in Brief (2011), *available at* http://actionplan.gc.ca/grfx/BAP-RCC/bap_brief-paf_bref-eng-dec2011.pdf.

When the confiscation of a NEXUS pass seems unfair, a Canadian traveler must appeal the enforcement action and the confiscation as two separate appeals. The enforcement action must be overturned in order for NEXUS privileges to be reinstated. If the confiscation is undertaken by U.S. Customs, an appeal is sent to the U.S. Ombudsman.

D. Canadian Federal Budget Announcements

Federal Finance Minister Flaherty announced several trade-related initiatives in the March 2012 Budget.[100] Canada announced its intention to "refresh" its Global Commerce Strategy by undertaking extensive consultations with the business community, with a particular emphasis on small and medium-sized businesses. It is expected that Canada will continue to aggressively pursue opportunities to enter into yet more FTAs and FIPPAs with countries holding the most opportunities for Canadian businesses.

The Budget also announced the Government's intention to review its FTZ-like policies and programs to ensure they are competitive, well marketed, and efficiently administered. Consultations have been concluded but no further announcements have been made. Canada also plans to undertake a comprehensive review of the General Preferential Tariff (GPT) regime.

E. International Mutual Assistance

Traditionally, Canadian courts resisted use of their jurisdiction to enforce revenue laws of foreign states. When it came to gathering information and evidence for criminal investigations and prosecutions, countries assisted each other through diplomatic channels, direct relationships between police officers and forces, and by posting police liaison personnel in foreign states. Over the last forty years, the need for alternative methods of evidentiary assistance gave rise to Mutual Legal Assistance Treaties intended to permit efficient production of evidence in criminal matters. Applicable Canadian legislation includes the Mutual Legal Assistance in Criminal Matters Act (MLACMA).[101]

The MLACMA provides safeguards to prevent abuse and preserve Canadian sovereignty, including top-level ministerial approval and judicial oversight. But some bureaucrats see safeguards as impediments. Consequently, a number of administrative international mutual assistance protocols have been developed between government departments, regulatory agencies, and self-regulatory organizations. Some of these agreements are secret and lack the usual public scrutiny such as publication in the *Canada Gazette*. The implications are serious; on a daily basis Canadians' otherwise confidential information is being shared with foreign agencies under the purported authority of these agreements.

In the area of customs, Canada has entered into several agreements on Customs Cooperation and Mutual Assistance in Customs Matters.[102] These agreements are stated to be solely for mutual administrative assistance. Consequently, they lack the high level minis-

100. James M. Flaherty, Can. Minister of Finance, Jobs Growth and Long-Term Prosperity: Economic Action Plan 2012 (2012), *available at* http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf.

101. Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (Can.).

102. *See*, *e.g.*, Council Decision 98/18, 1998 O.J. (L 007) (EU).

terial and judicial safeguards noted above. But these administrative agreements are being used to gather evidence for criminal proceedings in foreign countries in contravention of MLACMA.

Judicial challenges to this use of the administrative protocols have been few because citizens whose data is being shared are not notified. But such challenges are expected to arise when foreign governments use the information obtained for criminal prosecution purposes without resorting to relevant MLACMA safeguards.

IV. Mexican Legal Developments

A. Export Controls Legal Framework

Mexico was admitted as the forty-first member of the Wassenaar Agreement on January 25, 2012.[103] Due to its admission to the Wassenaar Group, Mexico issued regulatory provisions on March 2, 2012 related to the export controls for nuclear equipment, which were immediately increased on June 18, 2012.[104] On June 7 and 15, new amendments were made to the Federal Resolution on Export Controls to incorporate more HTS numbers and provide clarification about the goods subject to regulation.[105] On October 23, 2012, a new amendment to the Export Controls Resolution was published in the official Gazette to incorporate the list of regulated goods, chemical and biological products, dual products, and materials pursuant to the regulations of the Australian Group adopted by Mexico to improve its international references to the framework.[106] As of this writing, there is a wide list of software, industrial equipment, machinery, and other items subject to a preliminary export permit that must be issued by the Economy Department.

---

103. *See* Press Release, U.S. Dep't of State, U.S. Congratulates Mexico on Accession to Wassenaar Arrangement (Jan. 25, 2012), http://www.state.gov/r/pa/prs/ps/2012/01/182499.htm.

104. *See* Acuerdo Que Establece La Clasificación Y Codificación De Mercancías Cuya Importación Y Exportación Está Sujeta A Autorización Por Parte De La Secretaría De Energía [Agreement Which Establishes the Classification and Codification of Goods Whose Import and Export are Subject to Authorization from the Secretariat Of Energy], Diario Oficial de la Federacion [DO], 02 de marzo de 2012 (Mex.); Acuerdo Por El Que Se Modifica El Diverso Que Establece La Clasificación Y Codificación De Mercancías Cuya Importación Y Exportación Está Sujeta A Autorización Por Parte De La Secretaría De Energía, Publicado El 2 De Marzo De 2012 [Agreement Amending the Previous Agreement Establishing the Classification and Codification of Goods Whose Import and Export is Subject to Authorization by the Ministry of Energy, Published March 2, 2012], Diario Oficial de la Federacion [DO], 18 de junio de 2012 (Mex.).

105. Acuerdo por el que se Sujeta al Requisito de Permiso Previo por Parte de la Secretaría de Economía la Exportación de Armas Convencionales, Sus Partes y Componentes, Bienes de uso Dual, Software y Tecnologías Susceptibles de Desvío Para la Fabricación y Proliferación de Aarmas Convencionales y de Destrucción Masiva [Agreement Subject to the Requirement of Prior Permission from the Ministry of Economy, the Export of Convention Weapons, Their Parts and Components, Goods for Dual Use, Software and Technologies Likely to Detour For the Manufacture and Proliferation of Conventional Weapons for Mass Destruction], Diario Oficial de la Federacion [DO], 16 de junio de 2012 (Mex.).

106. Acuerdo Que Modifica El Diverso Por El Que Se Sujeta Al Requisito De Permiso Previo Por Parte De La Secretaría De Economía La Exportación De Armas Convencionales, Sus Partes Y Componentes, Bienes De Uso Dual, Software Y Tecnologías Susceptibles De Desvío Para La Fabricación Y Proliferación De Armas Convencionales Y De Destrucción Masiva, Publicado el 16 de Junio de 2012 [Agreement Amending the Previous Amendment, Subject to the Requirement of Prior Permission from the Secretary of Economy the Export of Conventional Weapons, their Parts and Components, Dual Use Goods, Software and Susceptible to Diversion Technologies for the Manufacture and Proliferation of Conventional Weapons and Mass Destruction, Published on June 16, 2011], Diario Oficial de la Federacion [DO], 22 de octubre de 2012 (Mex.).

B. Mexican AEO program

Adopted under the "Empresa Certificada" scheme in January 2012, Mexico issued the first stage of its own AEO Program under the umbrella of the former "Empresa Certificada" framework. Mexican Customs Administration has published and put into operation its new voluntary security program, "Nuevo Esquema de Empresas Certificadas" (NEEC), which allows importers and exporters to be certified and receive trade-related benefits in return as they adopt a security profile covering their supply chain.[107] Mexican manufacturers that are already certified under the U.S. C-TPAT program have been considered already in compliance for NEEC during this first stage, keeping along the benefits granted by CBP, while they are also sheltered with additional benefits such as prioritization of cargo during an incident, non-intrusive inspections, logistics costs and timeframes, customs facilities, as well as other "extraordinary services" from Mexican Customs.

C. Mexican Single Window for Trade

Another relevant development put into action by Mexican Customs Administration during June 2012 is the Single Window for Trade (Ventanilla Unica or VUCE), adopted to significantly facilitate trade and insert the country's economy in the global trends.[108] This tool allows exporters and importers to meet government requirements on trade by instantly sending relevant information such as type of product, volume, destination, and mode of transportation at one time. This confirms the new philosophy adopted by Mexican Customs in the sense that "promoting trade is not just about reducing or eliminating tariff and non-tariff barriers, but also about moving increasing volumes of . . . goods through the borders faster."[109] The Single Window for Trade is paperless and replaces the need for making 165 proceedings and submitting more than 200 different pieces of data, such as importing or exporting licenses, certifications of origin for products, invoices, and shipping verification orders.[110]

D. Reference prices upon import

Mexico has begun an important crusade to try to identify undervaluation practices upon import operations, specifically in still sensitive sectors such as textiles, garments, and footwear. Because the antidumping and transitional duties expired, national industries, along with the Mexican government, constructed a mechanism intended to "control" such Asian imports.[111] They analyzed the world costs values and determined their so-called reference price per HTS. This mechanism works at the moment of the customs dispatch: if the product's invoice value is below the reference prices in the customs system, the importer

---

107. *Nuevo Esquema de Emprasas Certificadas (NEEC)* [*New Scheme Certified Companies (NEEC)*], Mex. Sec'y Hous. & Pub. Credit, http://www.aduanas.gob.mx/aduana_mexico/2008/tramites/140_21436.html (last modified Nov. 20, 2012).

108. NAFTA Works Office, *Mexico Enhances Trade Facilitation through a Single Window*, U.S.-Mex. Chamber of Commerce (Jan. 12, 2012), http://www.usmcoc.org/new.php?id=115.

109. *Id.*

110. *Id.*

111. *See Mexico's Changing Climate for Anti-Dumping Rules*, H.K. Trade Dev. Council (June 1, 2012), http://economists-pick-research.hktdc.com/business-news/vp-article/en/1/1X07WURR.htm.

must provide a complete transaction support to validate the value. Although the products can still be imported, elements of the operations may be complicated and assumptions may harm legal businesses. The prices are not made public, are only known by the authorities and National Chambers, and are constantly varying based upon their updated analysis. It will be interesting to observe how this mechanism works for the intended purposes, without falling in a trade obstacle.

E. NAFTA Origin Audits

In accordance with NAFTA Chapter Five, the authorities of each country can verify the origin support of the products claimed as NAFTA upon importation.[112] In 2012, the Mexican authorities, the Tributary Administration Service (SAT), commenced a number of origin verification audits focused on many diverse sectors, including textiles, garments, steel, and valves. In 2012, a major advance in procedures allowed the importer to provide the exporters NAFTA evidence in their defense, even if the exporters failed to provide documentation in their own origin audit. This provides more equity to NAFTA audits' outcome and reinforces the commitment that the exporter and importer must have to succeed in origin verification procedures.

F. Human Rights in Mexico

As of January 2012, the Tax Court, which has competent authority to resolve customs litigation, has begun resolving cases under the human rights perspective for national or foreign individuals and entities to which CBP issues fiscal assessments.[113]

V. Australian Legal Developments

A. Free Trade

Effective January 10, 2012, Indonesia implemented the Free Trade Agreement between Australia, New Zealand, and the ASEAN countries.[114] On May 22, 2012, Australia signed a Free Trade Agreement with Malaysia to be effective on January 1, 2013.[115] Australia

112. North American Free Trade Agreement (NAFTA), U.S.-Can.-Mex., ch. 5, Dec. 17, 1992, 32 I.L.M. 289 (1993).

113. Nora Morales & Ramon Orendain, *Mexico: Mexico Taxation and Human Rights*, Int'l Tax R. (Sept. 6, 2012), http://www.internationaltaxreview.com/Article/3085534/Mexico-Mexican-taxation-and-human-rights.html.

114. Austl. Customs & Border Prot., Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Notice No. 2011/61 (Dec. 14, 2011), *available at* http://www.customs.gov.au/webdata/resources/files/ACNAANZFTA-2011-61_EIFforIndonesia.pdf.

115. *See* Malaysia-Australia Free Trade Agreement, [2013] ATS 4, *available at* http://www.dfat.gov.au/fta/mafta/documents/Malaysia-Australia-Free-Trade-Agreement.pdf. Commencement is subject to the implementation of domestic legislation in Australia and Malaysia. The Australian legislation to implement the Free Trade Agreement is available at www.aph.gov.au.

continues negotiations in the Trans-Pacific Partnership Agreement[116] and has joined negotiations for the Regional Comprehensive Economic Partnership.[117]

B. Trade Remedies

Parliament passed significant legislation adjusting the anti-dumping and countervailing regime[118] that may assist importers to bring actions against overseas exporters.[119] A November 27, 2012, government-commissioned report recommended, in part, establishing a new investigative agency.[120] The number of actions has increased and Australia has risen to either number two[121] or number four in the world, depending on the source,[122] with measures largely affecting aluminum and steel from Asia. Additionally, Australia passed the Illegal Logging Prohibition Bill 2012.[123] The Government stated it would increase obligations on importers and service providers to ensure that wood or wood-related materials are not from illegal logging, drawing objections from several countries.[124]

C. Supply Chain

Integrity checks were introduced for Customs officers and other government officials, along with new conditions on Government licensees.[125] This included new obligations to provide information on licensees' employees and for customs brokers to advise Customs

116. *See Trans-Pacific Partnership Agreement Negotiations*, Austl. Dep't of Foreign Affairs & Trade, http://www.dfat.gov.au/fta/tpp/ (last visited Jan. 20, 2013).

117. *See Australia's Trade Agreements*, Austl. Dep't of Foreign Affairs & Trade, http://www.dfat.gov.au/fta/index.html (last visited Jan. 20, 2013).

118. *See* Parliament of Australia, www.aph.gov.au. (last visited Jan. 20, 2013). The second, third, and fourth tracks of the legislation passed through the Parliament on November 27, 2012 and await Royal Assent. *See also Anti-Dumping Bills Pass the Australian Parliament Strengthening Australia's Anti-Dumping System*, Minister for Home Affairs (Nov. 27, 2012), http://www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2012/Fourth%20Quarter/27November2012AntidumpingBillspasstheAustralianParliamentStrengthening Australiasantidumpingsystem.aspx.

119. *See*, *e.g.*, David Uren, *Reform Not Easy Under Accord*, The Australian (Nov. 22, 2012), http://www.theaustralian.com.au/business/opinion/reform-not-easy-under-accord/story-e6frg9qo-1226521534761.

120. *See* Hon. John Brumby, Austl. Attorney Gen.'s Office, Review into Anti-Dumping Arrangements (2012), *available at* http://antidumpingreview.gov.au/files/2012/11/Brumby-Anti-Dumping-Review-Final-Report.pdf.

121. *See* Uren, *supra* note 119.

122. *See* Tom Westcott, *ITS Reporter*, ITS Global (Oct. 2012), http://www.itsglobal.net/sites/default/files/itsglobal/ITS%20Reporter%20October%202012_0.pdf (citing World Trade Org., Annual Report 2012, 49 (2012), *available at* https://wto.org/english/res_e/booksp_e/anrep_e/anrep12_e.pdf).

123. *See* Illegal Logging Prohibition Bill 2012 (Cth) (Austl.).

124. *See* Explanatory Memorandum, Illegal Logging Prohibition Bill 2012 (Cth) 62-63 (Austl.); *see* Parliament of Austl. Senate Comms., Additional Comments from the Liberal Party 52 (2012), *available at* http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=rrat_ctte/completed_inquiries/2010-13/logging_2011/report/d01.htm.

125. Press Release, Hon. Jason Clare MP, Minister for Home Affairs, Fed. Gov't Announces the Next Stage of Crack Down on Organised Crime on the Waterfront (May 25, 2012) http://www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2012/Second%20Quarter/25-May-2012—-Federal-Government-announces-the-next-stage-of-crack-down-on-organised-crime-on-the-waterfront.aspx.

of any error, omission, or breach of law discovered.[126] New mandatory continuing professional development requirements for customs brokers were also announced.[127]

126. *See* AUSTL. CUSTOMS & BORDER PROT., CUSTOMS BROKER LICENSE CONDITIONS AND CONTINUING PROFESSIONAL DEVELOPMENT FOR LICENSED CUSTOMS BROKERS, Notice No. 2012/29 (June 7, 2012), *available at* http://www.customs.gov.au/webdata/resources/files/ACN2012-29.pdf [hereinafter ACBPN 2012/29]; AUSTL. CUSTOMS & BORDER PROT., CUSTOMS BROKER LICENCE CONDITIONS: GUIDANCE TO CUSTOMS BROKERS AUSTRALIAN, Notice No. 2012/43 (Aug. 16, 2012), *available at* http://www.customs.gov.au/webdata/resources/files/ACN2012-43-CustomsBrokerLicenceConditions-Guidance-Final.pdf.

127. *See* ACBPN 2012/29, *supra* note 126; AUSTL. CUSTOMS AND BORDER PROT., CUSTOMS BROKER LICENSE CONDITIONS AND CONTINUING PROFESSIONAL DEVELOPMENT FOR LICENSED CUSTOMS BROKERS, Notice No. 2012/37 (June 29, 2012), *available at* http://www.customs.gov.au/webdata/resources/files/ACN2012-37.pdf.

THE YEAR IN REVIEW

AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW