citba.org
Customs and International Trade Bar Association

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## Upcoming Programs

Please visit the CITBA website (www.citba.org) for information about upcoming programs.

## Past CITBA Events

**Nov. 9, 2017: CITBA Fall Meeting**

CITBA welcomed Tim Reif, Senior Advisor at the Office of U.S. Trade Representative, and presented its Lifetime Achievement award for 2017 to Tina Kimble.

**September 21, 2017: Executing an Executive Order - How Exactly Did CBP Do That?**

CITBA's Young Lawyers Committee hosted a discussion of how CBP implements Executive Orders, focusing on the agency's recent response to President Trump's March 31, 2017 order Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws.

Panelists included:

- **Troy Riley -** Executive Director of Commercial Targeting and Enforcement, U.S. Customs and Border Protection

Moderator: **Alexandra Hess** - U.S. Customs and Border Protection, and CITBA Young Lawyers Committee Member

## CITBA's Young Lawyer Committee Membership

Interested in becoming more engaged with international trade?! Are you under 40 years old, feel young, or know someone that fits the bill? If so, please join or nominate someone to join the CITBA Young Lawyers Committee! We are especially looking to expand our

**In This Issue:**



**Links of Interest:**

CITBA Homepage

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US Customs and Border Protection

Bureau of Industry and Security

Office of Foreign Assets Control

International Trade Administration

US International Trade Commission

membership outside of the DC/NY area.

The Committee meets by phone once a month and seeks to create opportunities for young lawyers to create and participate in events and publications. If you or anyone you know is interested in contributing to the committee, please contact Alex Hess (alexandra.hess@hugheshubbard.com) or Shama Patari (spatari@barnesrichardson.com).

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## Announcements

**NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE**

***By Rebecca Demb, Stephen Swindell, Scott Warner****

**Amendments Abound!*

Amendments to six of the Court's Rules became effective on October 23, 2017. For the details, be sure to swing by the Court's website at: www.cit.uscourts.gov. In the meantime though, here's a quick rundown of the highlights:

**Injunction Junction, What's Your Function?**

Filing a 1581(c) case and have everyone's consent for a statutory injunction? Step right up and check out the amendments to Rule 56.2(a) and the new Form 24 Order of Statutory Injunction Upon Consent. Instead of preparing a motion and a proposed order to go along with it, you can just fill out this new form and file it with the Court, easy peasy style!

**Out with the Reserve Calendar and in with the Customs Case Management Calendar**

Rule 83 is chock full of changes this year! In days of old, 1581(a) cases were placed on the Reserve Calendar upon the filing of a summons. Now they, and cases that were on the Reserve Calendar, are on the Customs Case Management Calendar ("CCMC"). After 24 months, plaintiffs will have to file a motion to keep the case on the CCMC and will only be able to keep it there for another 24 months.

**Test Cases, Suspensions and Rule 83, oh my!**

More calendar happenings happened with the rules concerning test cases and suspension calendars. The rules formerly known as 84(a) through 84(h) can now be found in 83(e) through 83(l). Be sure to mark your suspension calendars!

**Nothing Could Be Finer Than To Amend A Form Niner**

Everyone's favorite Stipulated Judgment on Agreed Statement of Facts form was updated to reflect current practices and procedures. So the next time you're in a stipulated judgment kinda of mood, be sure to use the new and improved form!

## News You Can Use

### CITBA Welcomes a New Clerk of the CIT

Mario Toscano was appointed Clerk of the Court for the Court of International Trade (CIT) on October 24, 2017. He is the fifth person to hold the Clerk title since the inception of the CIT and the fourteenth to hold the position since the Board of General Appraisers was created in 1890. Mr. Toscano has served the federal judiciary with distinction for 29 years, holding positions of substantial management responsibility in federal District and Bankruptcy Courts and in the CIT. He has served as Chief Deputy Clerk for the CIT since 2011 and most recently, as the Acting Clerk of the Court, since July of this year. Throughout his career he has been an active court liaison to various Bar associations including CITBA. Mr. Toscano has also served on numerous court committees at both the national and local levels.

Mr. Toscano and his wife live on Long Island and they have a son and daughter both of whom are in college. He is honored to have been appointed Clerk and looks forward to working with CITBA in his new court executive role.

### CITBA Files Comments with the CAFC

On September 1, 2017, CITBA filed comments with the U.S. Court of Appeals for the Federal Circuit regarding its concern with proposed amendments 47.4 and 47.5 to the Court's rules.

These proposals suggested the addition of the term "agency" to the list of pending cases that need to be identified in briefs and certificates of interest and would further eliminate the ability to generally identify appeals where many related cases exist. The revised requirements would present significant problems in trade remedy and customs appeals, given the voluminous number of cases and agency proceedings that can be affected by many of the appeals before the Court.

A copy of the complete comments filed is available on CITBA's website (click hyperlink to access).

## Federal Circuit and CIT Case Summaries

***By Claudia Burke****

** Claudia Burke is an attorney with the Department of Justice, Civil Division, National Courts Section. These summaries are not a document of the U.S. Department of Justice, nor does it represent the official views of the Department of Justice.*

## Antidumping/Countervailing Duties

**Federal Circuit Affirms Commerce's "Masked" Dumping Practices.** *Apex Frozen Foods, et al. v. United States* [Newman, Taranto, J.J., Clevenger, S.J.] On July 12, 2017, in a pair of rulings stemming from companion cases, the Federal Circuit affirmed multiple aspects of the Department of Commerce's practices for combatting "masked" or "targeted" dumping. Masked dumping occurs when a foreign exporter sells merchandise at dumped prices for a particular customer, region, or time period, while making other sales at non-dumped prices that mask its dumping activity. The antidumping statute authorizes Commerce to counteract masked dumping by departing from its usual calculation methodology of comparing a foreign exporter's average United States sales prices to its average home market prices, and instead comparing individual United States transactions to average home market prices. In doing so, Commerce also zeroes-out any negative margins of non-dumped sales so no masking occurs (a practice called "zeroing"). The Apex decisions affirmed as reasonable Commerce's practices of including all sales in its analysis rather than just allegedly targeted ones, Commerce's "meaningful difference" test for determining when to apply the alternate average-to-transaction methodology, and Commerce's use of zeroing in its masked dumping practice.

**Court of International Trade Sustains Commerce's Authority To Define Scope of Unfair Trade Practice Investigations.** *SunPower Corp. v. United States; Kyocera Solar, Inc. v. United States* [Kelly, J.] In two decisions issued on July 21, 2017, the Court of International Trade sustained Commerce's departure from its typical country of origin test in antidumping and countervailing duty determinations covering solar products from China and Taiwan. In unfair trade practice investigations, Commerce must identify the "class or kind" of merchandise as well as the country of origin. In earlier investigations into solar cells produced in China, Commerce applied duties based on the country in which the solar cells were produced, not where the cells were assembled into panels. The domestic solar industry sought additional orders, alleging that Chinese companies were circumventing the previous orders by shifting their cell production to Taiwan and other countries. Commerce determined that solar panels and modules assembled in China from third-country solar cells (the products' core component) would be considered Chinese in origin. The court upheld as lawful Commerce's explanation that it was not applying different rules of origin, or according inconsistent treatment, to the same "class or kind" of merchandise.

**Court of International Trade Remands Commerce's Determination that Antidumping**

**Suspension Agreement with Mexican Tomato Producers Would Eliminate Injurious Effect of Imported Mexican Tomatoes.** *The Florida Tomato Exchange v. United States* [Eaton, J.]. On August 25, 2017, the Court of International Trade again remanded Commerce's determination that a 2013 suspension agreement with Mexican tomato producers - the most recent of a series of suspensions of a 1996 antidumping investigation - met the requirements of 19 U.S.C. § 1673c(c). Generally, Commerce may enter into a suspension agreement if extraordinary circumstances are present and the agreement will eliminate completely the injurious effects of the imported merchandise. Specifically, the agreement must, for each entry, eliminate 85 percent of the estimated dumping margin, and also prevent the "suppression or undercutting" of domestic producers' prices. The court sustained Commerce's determination that the suspension agreement would eliminate 85 percent of dumping, holding that it was not unreasonable for Commerce to rely upon the pledge made by the Mexican exporters in the agreement. With respect to price suppression or undercutting, the court held that Commerce's general methodology for setting minimum reference prices in the agreement was reasonable, but it remanded Commerce's decision to use prices during the 2011-2012 winter season as the basis for calculating the new reference prices, stating that Commerce's decision was not sufficiently explained and was not supported by evidence in the record.

**Court of International Trade Sustains Commerce's Remand Determination In Antidumping Investigation of Taiwanese Steel Nails.** *Mid Continent Steel & Wire, Inc. v. United States*, [Kelly, J.]. On October 11, 2017, the Court of International Trade sustained Commerce's allocation of expenses associated with the Taiwanese nails producer's separate steam line of business in an antidumping duty investigation of imports of certain steel nails from Taiwan. The Taiwanese nails producer challenged Commerce's treatment of its production costs for steam as not supported by substantial evidence. On remand Commerce clarified, reconsidered, and revised its initial determination, which resulted in a revised final dumping margin for the Taiwanese nail producer. The court held that the remand determination was reasonable and supported by substantial evidence.

**Court of International Trade Affirms Commerce's Countervailing Duty Determination Against an Uncooperative Importer of Steel Pipes**. *Özdemir Boru San. VE Tic Ltd. Sti. v. United States* [Katzmann, J.]. On October 16, 2017, the Court of International Trade denied in part the motion for judgment on the agency record filed by a Turkish importer. Özdemir, an importer of heavy walled rectangular welded carbon steel pipes and tubes, challenged Commerce's determination that Özdemir failed to act to the best of its ability when it did not provide full and accurate information in a questionnaire response about subsidies it had received from the Turkish government. The court sustained Commerce's determination, rejecting Özdemir's argument that, though its questionnaire response was incorrect, Commerce should have deduced that Özdemir had not benefited from the subsidy based on information available elsewhere on the record. The court then sustained Commerce's methodology to select a subsidy rate to apply as an adverse inference. The court remanded on the separate issue of whether Commerce properly considered certain land parcels in determining whether Özdemir had purchased land for less than adequate remuneration.

## Customs

**Court of International Trade Holds Nearly $3 Million Penalty Enforcement Action for Transshipped Chinese Crawfish Exempt from Bankruptcy Automatic Stay Protection**. *United States v. Rupari Food Services, Inc.* [Katzmann, J.]. On August 10, 2017, the Court of International Trade held that a penalty action brought to enforce U.S. Customs and Border Protection's police and regulatory power is exempt from the automatic stay in bankruptcy.

**Court of International Trade Finds Importer Liable for Over $1.5 Million in Unpaid Duties And Eligible for a Civil Penalty of Nearly $21 Million for Gross Negligence In Importing Shoes From Vietnam**. *United States v. Sterling Footwear, Inc.* et al. [Barnett, J.]. On October 12, 2017, the Court of International Trade entered an opinion granting the United States summary judgment in a penalty action brought to recover unpaid duties, a monetary penalty for gross negligence, and delinquency interest from an importer of Vietnamese shoes. The United States alleged that Sterling Footwear, Inc. had falsely entered its shoes at a 6 percent duty rate under a tariff provision for "rubber tennis shoes" when, in fact, the shoes were made of a variety of other materials and were subject to duty rates up to 48 percent. The court found that the importer was grossly negligent because it knew the composition of the shoes that it had designed and had manufactured, and that Sterling had been indifferent to or had disregarded its statutory obligations to correctly classify the footwear it had imported. The court ordered Sterling to pay to the government $1,566,824.85 in unpaid duties, plus pre-judgment interest. The court also found that Sterling is eligible for a civil penalty of up to $20,758,323.88, but deferred a determination as to the amount of the penalty until all liable parties (whose conduct is relevant to the inquiry) have been identified.

**Court of International Trade Affirms Government's Tariff Classification of Food Casings**. *Kalle USA, Inc. v. United States* (Case No. 13-00003 [Katzmann, J.]. On November 2, 2017, the Court of International Trade granted summary judgment for the government, finding that food casings composed of textile coated on one side with plastic and glued at the edges to form a tube are classifiable as made up textile articles under heading 6307, Harmonized Tariff Schedule of the United States (HTSUS), rather than as plastics articles under heading 3917, HTSUS. Tariff classification is determined according to the General Rules of Interpretation (GRI), and under GRI (1), the classifier looks to the "terms of the heading and any relative section or chapter notes." The court rejected plaintiff's argument that section notes always trump chapter notes. The court also rejected plaintiff's argument that the term "assembled" (for purposes of defining the term "made up" in heading 6307) requires the joining of two separate components.

## Feature Articles

### Why Don't More Chinese Manufacturers Seek U.S. Counsel to Respond to ADD/CVD Investigations

***By Leo Zhu****

** Leo Zhu is a Chinese attorney from Zhejiang Chession Law Firm (based in Hangzhou, China) and member of CITBA.*

As we all have noticed from Federal Register notices from USITC or DOC's homepages, from time to time, products from China are being placed under AD/CVD investigations, either in new initiations or in all kinds of administrative reviews. So, here comes a very contradictory phenomenon: on the one hand, more and more Chinese companies are being hit by such investigations; on the other hand, not many Chinese enterprises appear in the process, including hearings related to the investigations. Why is this happening? How can US attorneys take hold of these opportunities and help Chinese companies deal with such problems?

From a Chinese attorney's perspective, it's not hard to decode such phenomenon. First, Chinese entrepreneurs are not used to litigation and legal procedures like those found in ADD and CVD investigations. Even though USITC and DOC's investigations are not formal court proceedings, the evidence collecting and showing and opinion expressing that take place during the hearing are similar to a litigation. Traditionally, Chinese businesspersons are not used to resolve disputes through litigation. This preference has been in place since ancient times, probably hundreds of years ago. As a result, when a Chinese business owner is faced with such an investigation, he is inclined to back away from it.

Second, the procedures involved in the investigation process are seen as abstract and resource-consuming by the Chinese business owner. The procedures in AD/CVD cases are more complicated than those in commercial litigation and involve a variety of US government agencies and offices, including USITC, DOC, and CBP. This further discourages involvement by Chinese enterprises, which are concerned that a lot of time, energy, and money would be spent during their participation in the investigation.

Third, US attorneys' legal fees are generally not fixed and there is no way to reliably predict the outcome when the investigation is first launched. Usually, when a legal action is brought in China, the business owners would go to a Chinese attorney and ask for a fixed legal fee. At the same time, the Chinese attorney would give them a general prediction of the expected or likely result. Chinese entrepreneurs understand the expected return on the legal fees that will be paid at the outset. In AD/CVD cases, however, it is more difficult to predict the outcome and the level of complication that will be present during the investigation. As a result, US attorneys understandably insist on hourly-rate payment or monthly fixed-fee payment to represent a business during an ADD or CVD investigation. But without a cap-fee expectation, Chinese business owners are unlikely to divert from their habits and retain US counsel.

So, with these issues being in the way of getting counsel in AD/CVD cases, it's not very likely for Chinese enterprises to retain US counsel when they face such tough problems. In addition, cultural differences are prominent during communications throughout the process. So, are there any ways to bridge the divide? It is not easy to say, for sure. But understanding the potential client's mindset and concerns will help US attorneys interested in representing Chinese businesses during US AD/CVD investigations.

## CITBA ONLINE

**Please look for further announcements and copies of past newsletters at: http://www.citba.org/**

## MEMBERSHIP

CITBA now allows dues payment through PayPal. PayPal allows members to send money without sharing financial information, with the flexibility to pay for membership using their account balances, bank accounts or credit cards. PayPal is an eBay company and is made up of three leading online payment services. More information about Pay Pal can be found at: https://www.paypal.com/home.

Not a CITBA member? Apply for membership now! CITBA offers different membership levels - active, associate and retired/student. For additional information, check out the CITBA website: Join CITBA or Renew.

Are you already a member, but late in paying your dues? Need to update your contact information? Get current today and enjoy the benefits of membership. Contact William J. Maloney at wmaloney@rode-qualey.com for details.