

Upcoming Programs

November 1: Special Presentation Celebrating 50 Years at the CIT Courthouse

CITBA and the United States Court of International Trade's Historical Society cordially invite you to a Special Presentation in celebration of the 50th Anniversary of the James L. Watson Courthouse:

YOU ARE THERE! A CIT Trial Set in 1968

Witness a Calendar Call, and Return to Procedures and Practices Employed by Plaintiff's Counsel, Customs Section Counsel and the Bench

Featuring: "Judge" Patrick D. Gill and a cast of attorneys at least as old as the courthouse including, Michael S. O'Rourke, Gilbert Lee Sandler, Joseph I. Liebman and Peter Jay Baskin

Date and Time: 3:45 PM, November 1, 2018 (This presentation and reception will follow the 2:30 Special Session of the Court to celebrate the fiftieth anniversary of the James L. Watson Courthouse.)

5:00 PM - Reception with the U.S. Court of International Trade Judges and Meeting of the Customs and International Trade Bar Association in the Library, U.S. Court of International Trade

Location: United States Court of International Trade Ceremonial Courtroom of the James L. Watson Courthouse
One Federal Plaza
New York, NY 10278

RSVP NOW via Email to:
mludwikowski@ClarkHill.com

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

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Stay Connected:

Past CITBA Events

October 11, 2018: Reception

CITBA welcomed Jason Kearns, recent ITC Commissioner, to a conversation over wine and cheese reception with our members.

July 12, 2018: Negotiating Trade Agreements with Ambassador Susan Schwab

CITBA's Young Lawyers Committee and Kelley Drye & Warren LLP welcomed former U.S. Trade Representative Susan Schwab, who discussed her fantastic insights into the art and science of negotiating trade agreements based on her decades of experience in government and the private sector.

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Announcements

NEWS FROM THE CLERK OF THE COURT OF INTERNATIONAL TRADE



*By Stephen Swindell and Scott Warner**

**Stephen Swindell is the Supervisor and Scott Warner is the Operations Manager for Case Management at the Court of International Trade.*

My Amendment Has a First Name, It's E-A-P-A

With no comments being submitted, the Court approved adoption of the latest round of amendments to the Rules of the Court concerning the Enforce and Protect Act, or EPA for you acronym fans out there. The amendments will become effective on October 15th, 2018 and involve Rules 3, 24, 56.2, 73.2, 73.3 and Administrative Order 02-01 as well as several forms and specific instructions for certain forms. For those eager to get a jump on the knowledge, they can be found on the Court's website at: www.cit.uscourts.gov.

Can I Get Fees On That?

The Court is also following in the footsteps of other courts in adopting Judicial Conference-approved amendments to the Schedule of Fees, including a new \$31 fee for the reproduction of electronic records stored outside of the CM/ECF system. These amendments will also become effective on October 15th, 2018 and can be found on the Court's website.

Still Nifty At Fifty

The Court will be celebrating the fiftieth anniversary of the Courthouse by holding a Special Court Session in the Ceremonial Courtroom on November 1st, 2018 at 2:30pm. Afterwards, there will be presentations by the Historical Society of the U.S. Court of International Trade and lastly, a reception. If you would like to attend, please RSVP by October 22, 2018 at: Special_Events@cit.uscourts.gov. Hope to see you there!

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 Anti-Dumping Duty on Honey from China. *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Grp. Corp. v. United States*, [Prost, C.J., O'Malley, Stoll, JJ.] In a *per curiam* decision issued on September 10, 2018, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's judgment sustaining Commerce's recalculation of anti-dumping duties imposed on imports of honey from China. Following a stay pending appeal in a related case, and a voluntary remand for further administrative proceedings, the trade court sustained Commerce's selection of valuation data and financial statements and the methodology to adjust for inflation.

Court of International Trade Sustains Commerce Department's Remand Decision Regarding Antidumping Duties on Xanthan Gum from China. *CP Kelco US, Inc. v. United States* [Goldberg, S.J.]. On September 17, 2018, the Court of International Trade sustained Commerce's remand redetermination regarding imports of xanthan gum from China. Earlier in the case, the court sustained certain aspects of Commerce's surrogate value determination, but remanded Commerce's determination to reject a financial statement of a Thai company that was not completely translated. Finding the incomplete translation unacceptable, Commerce had relied instead on a financial statement of a different Thai company despite evidence that the company had received distortive subsidies from the Thai government. The court rejected Commerce's rationales, and ultimately directed Commerce to use the not-fully-translated statement, which Commerce then did in the fourth remand, reducing respondent's dumping margin to zero. The court sustained the remand determination and entered judgment.

Court of International Trade Grants Motion to Dismiss Antidumping Challenge for Lack of Jurisdiction. *National Nail Corp. v. United States*, No. 18-00053 [Barnett, J.]. On September 24, 2018, the Court of International Trade granted the government's motion to dismiss plaintiff's complaint for lack of subject-matter jurisdiction. National Nail, an importer of steel nails from Taiwan, sought to challenge Commerce's antidumping results. National Nail had not participated in the underlying administrative proceeding, as required by statute to seek judicial review. Because judicial review would have been available had National Nail satisfied the statutory requirement applicable to antidumping proceedings, the court rejected National Nail's attempt to invoke the court's "catch-all" jurisdictional provision, which is only available when no other provision is or could have been available.

Court of International Trade Sustains Commerce's Countervailing Duty Investigation

of Steel Concrete Reinforcing Bar from Turkey. RTAC v. United States, No. 17-00157 [Gordon, J.]. On September 20, 2018, the Court of International Trade sustained Commerce's final determination in a countervailing duty investigation of rebar from Turkey. The court sustained Commerce's decision that the Turkish government's operation of an electricity grid through which electricity is bought and sold by private parties at market prices did not constitute a countervailable subsidy to rebar producers who sell electricity on that grid. The court also sustained Commerce's determination that electricity sales to public entities were not presumptively for more than adequate remuneration simply because the rates negotiated between the parties were based on prices set by a national price schedule, when the record did not indicate that the national prices were anything other than market-based.

Court of International Trade Sustains Determination of Masked Dumping in Administrative Review of Nails from China. *The Stanley Works (Langfang) Fastening Systems Co., Ltd. v. United States* [Eaton, J.]. On August 13, 2018, the Court of International Trade sustained Commerce's imposition of antidumping duties on imports of Chinese nails. The Chinese exporter, Stanley, had challenged Commerce's methodology for determining the rate of dumping, which is generally the difference between the average prices paid for subject merchandise in the home and United States markets. The court sustained Commerce's masked dumping methodology, in which the agency used the Cohen's-*d* test and other statistical thresholds to determine whether Stanley had differentially priced nails to certain regions, customers, or over certain periods of time. In such cases, instead of comparing average values, Commerce compares individual United States transaction values to the average foreign market value and sets all negative rates of dumping to zero, thereby increasing the rate of duty. The court agreed that Commerce had permissibly exercised its gap-filling authority in devising its methodology to unmask hidden dumping and applying it to this case.

Court of International Trade Sustains Commerce's Administrative Review of Antidumping Order Covering Certain Steel Nails From The People's Republic Of China. *Mid Continent Steel & Wire, Inc. v. United States*, No. 17-00051, [Eaton, SJ]. On June 19, the Court of International Trade sustained in their entirety the final results of Commerce's 2014-2015 administrative review of the antidumping duty order covering certain steel nails from China. Commerce had calculated a dumping margin of 5.78 percent for mandatory respondent The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (Stanley). The other mandatory respondent, Tianjin Lianda Group Co., Ltd., was assigned the China-wide rate of 188.04 percent because it had failed to establish independence from the Chinese government. Commerce established the all-others rate for separate rate companies as 5.78 percent, the rate calculated for Stanley, because the general rule for calculating the all-others rate is to average the margins for mandatory respondents, excluding zero and *de minimis* margins, and margins based on adverse facts available. Mid Continent argued that the 5.78 percent margin assigned to the separate rate companies did not reflect their economic reality, and that Commerce erred in valuing the surrogate data inputs for Stanley's sealing tape and plastic granules. The court upheld Commerce's decision to apply the general rule in assigning the all-others rate and also held that Commerce's choice of surrogate data inputs for Stanley's sealing tape and plastic granules was supported by substantial evidence.

Court of International Trade Dismisses Complaint Brought by Producers and Importers of Chlorinated Isocyanurates from China Under 28 U.S.C. §1581(i). *Juancheng Kangtai Chemical Co., Ltd. and NAC Group, Ltd. v. United States*, [Goldberg, SJ.] On June 19, 2018, the Court of International Trade granted the United States' motion to dismiss two Chinese producers and importers' complaint brought under

28 U.S.C. §1581(i). The court found that residual jurisdiction was not available under section 1581(i) with respect to the first three counts of the complaint. In general, jurisdiction is available under section 1581(i) only when jurisdiction is not and could not have been available under another subsection of section 1581, or when another subsection provides an inadequate remedy. The court determined that an adequate remedy was available under section 1581(c) with respect to the first three counts of the complaint, which contested various aspects of an antidumping duty order. With respect to the final count of plaintiffs' complaint challenging a Commerce procedure, the court dismissed the count because plaintiffs had not articulated any injury resulting from the procedure.

Customs

Federal Circuit Affirms Court of International Trade's Judgment Upholding the Government's Classification of LED Tea Lights and Candles. *The Gerson Company v. United States*. On August 6, 2018, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's grant of summary judgment for the government, finding that certain imported LED tea lights and candles are classifiable for tariff purposes as "lamps and lighting fittings" under heading 9405, Harmonized Tariff Schedule of the United States (HTSUS), rather than as "electrical machines and apparatus, having individual functions" under heading 8543, HTSUS, or as "diodes, transistors and similar semiconductor devices; . . . light-emitting diodes" under heading 8541, HTSUS, as claimed by the plaintiff. The court rejected the importer's broad interpretation of heading 8543 ("electrical machines and apparatus") to include the products at issue and found that such an interpretation would impose a "specific, and drastic, limitation" on the scope of heading 9405, which is not supported by the terms of the heading itself. The decision means that importers will continue to pay duties at a rate of 3.9 percent, instead of 2 percent rate.

Court of International Trade Grants Government's Motion to Dismiss Action Challenging Denial of Request for Retroactive GSP Treatment. *Industrial Chemicals, Inc. v. United States* (Ct. No. 17-00177) [Choe-Groves, J.]. On September 24, 2018, the Court of International Trade granted the government's motion to dismiss this action for lack of subject matter jurisdiction and failure to state a claim. The court found that U.S. Customs and Border Protection (CBP) had properly denied plaintiff's request for retroactive duty free treatment under the Generalized System of Preferences (GSP) because the request was made after the statutory deadline for filing such claims. The court also found that a handwritten note from CBP informing plaintiff of the statutory deadline for retroactive GSP claims did not constitute a decision that could be protested. As a result, the court lacked jurisdiction because plaintiff's protest was untimely, having been made more than 180 days after liquidation.

Court of International Trade Dismisses Complaint for Failure to Satisfy Pre-Filing Requirements. *Dis Vintage, LLC v. United States*, Court No. 16-00085 [Stanceu, CJ]. Plaintiff, an importer, brought this action to challenge the denial of an administrative protest by Customs and Border Protection (CBP). By statute, an importer must pay "all liquidated duties, charges, or exactions" before seeking judicial review of CBP's protest decision. On August 18, the court granted the government's motion to dismiss for lack of jurisdiction upon finding that plaintiff had failed to pay all amounts assessed by CBP prior to filing the action. Although the outstanding balance was minimal (\$26.16 in interest), and plaintiff eventually paid the full amount owed, the court held that, because the payment requirement is jurisdictional, it must be satisfied before the action is initiated. The court rejected plaintiff's contentions, sounding in equitable estoppel, that it was not provided with adequate notice of the exact amount owed and that email

communications from CBP did not alert it to the open status of its bill. The court also noted that, when plaintiff finally paid the amount owed, it still had time to dismiss the action and commence a new one.

Court of International Trade Asserts Jurisdiction to Entertain Actions Seeking to Collect Federal Excise Taxes on Imported Tobacco Products. *United States v. Maverick Marketing LLC, et al.* (Ct. Int'l Trade) [Kelly, J.]. On July 7, 2018, the Court of International Trade held that Federal Excise Tax (FET) on imported tobacco products collected by CBP shall be treated as a "customs duty" for the purposes of the court's jurisdiction. The government had alleged that an importer and domestic cigar distributor had unlawfully conspired to shield the true value of imported cigars to evade FET, which is based on the price of the first arms-length sale after importation.

Feature Articles

Automotive Trade under the USMCA

by Fernando Holguin Casas*

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Finally, some certainty. Although the USMCA still must be signed, ratified and passed before it can go into effect on January 1, 2020, as expected, its text has produced clarity and stability on the modifications and future of the Automotive Trade between the United States, Canada and Mexico.

A. REGIONAL VALUE CONTENT (RVC)

- * RVC for vehicles increases from 62.5% to 75%.
- * RVC thresholds for three categories of automotive parts:
 - a. Core Parts (Engine, transmission, body & chassis, axle, suspension, steering, advanced batteries): **75% RVC**. There will be a transition period of 3 to 5 years. Must be originating for the vehicle to be originating.
 - b. Principal Parts (Tires, glass, pumps & compressors, A/C, bearings & bearing housings, electric motors used as primary source of propulsion, electric motors for electrical variable transmission, electromagnets, starter motors & generators, bumpers, safety belts, brakes, road wheels, radiators, mufflers, clutches, airbags, seats, and parts of seats): **65% RVC**.
 - c. Complementary Parts (Pipes, catalytic converters, valves, taps & cocks, electric motors and universal AC/DC motors not exceeding 37.5W, DC motors and generators not exceeding 750W, other batteries, distributors & ignition coils, electrical lighting, windshield wipers/defrosters, sound recording/reproducing apparatus, switches, insulating wiring sets, headlamps, electronic instruments & measurement equipment): **65% RVC**.

* New RVC for North American Steel and Aluminum at **70%**.

B. LABOR VALUE CONTENT REQUIREMENT (LVC)

- * New Labor Value Content requirement (LVC)
- * 40% of passenger vehicle must be made by Hourly wage (production/trades/temps) above \$16 USD/hour (at least 25% from materials & manufacturing content).
- * 45% of pickup trucks & Cargo vehicles must be made by Hourly wage (production/trades/temps) above \$16 USD/hour (at least 30% from materials and manufacturing content).
- * Can average within one country across class, model, or plant.
- * Up to 5% credit toward LVC for assembling the vehicle in high-wage region in North America.
- * Up to 10% credit toward the LVC from R&D and IT work done in the region.

C. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

Mexico and Canada also negotiated side agreements (letters) which mostly exempt light vehicle and auto parts exports to the United States from potential national security tariffs under Section 232 of the Trade Expansion Act of 1962.

Consequently, each of these countries can send up to 2.6 million passenger vehicles per year, as well as unlimited number of light trucks. \$32.4B (for Canada) and \$108B (for Mexico) in parts will be exempt from any U.S. imposed Section 232 tariff on imported vehicles or parts.

Mexico, additionally negotiated provisions exempting non-USMCA automotive exports from potential increases in the (MFN) rates of the United States. As a result thereof, 1.6 million units (vehicles) which are non-USMCA originating under the new scheme, will be grandfathered in at the current 2.5% tariff rate for passenger cars and automotive parts and 25% tariff rate for pickup trucks and cargo vehicles.

Currently, based on calculations by the Mexican Government, approximately 780,000 vehicles (32% of Mexico's current vehicle output, which is below the 1.6 million cap) are not originating under the new USMCA Rules of Origin.

D. EXPECTATION

As a result of the new scheme of automotive trade in the North America region, we would expect automakers and suppliers to move more work to this region. Additionally, for some sectors in the industry such as light vehicles and automotive parts, we foresee a raise in the productions costs, which would eventually result in the increase of the consumer prices.

Challenging the Legitimacy of the Current Use of Section 301 Tariffs in US Legal Systems, is it possible?

by Leo Zhu*

**Leo Zhu is an attorney with Zhejian Chesson Law Firm in China and a CITBA member. He can be reached at: leo@chessionlaw.com.*

Since early March of 2019, President Trump and USTR had raised tough challenges against Chinese companies and normal international trade business between China and US. The first group was a \$50 billion list of Chinese goods, mainly composed of high-tech industry products. The second group was a \$200 billion list, which was composed of daily used products, such as textile, food, bicycles etc. Originally it was composed of around 6000

items, after public comments and a 6-day public hearing, 297 items were deleted. And the news said that another \$267 billion list is under way.

Leo Zhu, as the only Chinese attorney representative who participated in the 6-day public hearing of the second list together with around 300 entrepreneurs or scholars, expressed objections over the tariffs under Section 301. Now the open question is: is Section 301 outdated under WTO era, according to WTO laws or US domestic laws?

As we have seen in the case WT/DS152/1, which was raised by EU against US in 1998 and challenged the legitimacy of Section 301 under WTO, it was with the file of "Statement of Administrative Action" (SAA) that finally WTO Panel decided that Section 301 was not against WTO rules. So, each time US President or USTR was about to use Section 301 related laws, this SAA and its terms could not be thrown away. Instead, the terms promising not uniquely raise Section 301 without WTO authorization when it comes to WTO related issues, should be binding all the time. But in the current \$50 billion and \$200 billion Section 301 investigations, there was no WTO authorization; so, would this be in violation of both WTO rules and US domestic laws?

Further, is the existence of Section 301 laws under modern society in violation of the Constitution? As we can see from the Constitution that Legislative branch "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises... ", even though the President has been authorized by Congress to collect duties under laws such as Section 301, the answer is not clear whether such authorization is against the Constitution's original terms. We can see that with Section 301, the trade tensions between China and US were lifted to so much uncertainty in such short term, which actually is harmful to the economy to not just China and US, but the global economy in whole. So, this may also be challenged in the future in US judicial systems.

All in all, Section 301 is a law that would face tough challenges in the coming years as the mounting trade disputes develop.

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@strtrade.com for details.

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