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Customs and International Trade Bar Association

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Upcoming Programs

November 18, 2019 - SAVE THE DATE - CITBA semi-annual meeting in conjunction with Court of International Trade Judicial Conference

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

Past CITBA Events

June 20, 2019 - Webinar with CBP Regulations and Rulings

CITBA hosted a successful webinar with a panel of CBP Regulations & Rulings. The panel discussed the role of each Division within R&R and answered questions of new and seasoned attorneys alike.

May 14, 2019 - CITBA Annual Meeting

A meeting of the Customs and International Trade Bar Association will take place at 5:00 PM or shortly thereafter on Tuesday, May 14, 2019, at the U.S. Court of Appeals for the Federal Circuit. At the meeting, CITBA will attend to association business. All members of the association are invited to participate.

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.*

The Proposed: Amendments to USCIT Rule 73.1 Posted for Comment

In This Issue:

Links of Interest:

CITBA Homepage

US CIT Homepage

US Court of Appeals for the Federal Circuit Homepage

US Customs and Border Protection

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International Trade Administration

US International Trade Commission

Stay Connected:

On June 27th, proposed amendments intended to clarify the requirements for filing samples pursuant to USCIT Rule 73.1 Documents in Action Described in 28 U.S.C. § 1581(a) or (b) were posted for comment. The proposed amendments can be viewed on the Court's website at: www.cit.uscourts.gov. Comments are to be submitted in writing to the Clerk of the Court by the close of business on July 29, 2019.

The Effective: Amendments to USCIT Form 24

On June 18th, the Court approved amendments to USCIT Form 24 Order for Statutory Injunction upon Consent to provide better guidance to parties filling out the form. The amended form became effective on July 1st and can be found on the Court's website.

And The Concluded: 2019 Attorney Renewal Registration

The 2019 Attorney Renewal Registration period came to a close in June. Per USCIT Rule 74(e)(1), all eligible attorneys who did not renew in time will have to apply for admission as a new member. Those attorneys who have CM/ECF accounts and missed the deadline will not be able to file electronically or access confidential information on the Court's CM/ECF system until they are admitted. Information regarding admission, including the Application for Admission, can be found on the Attorney Information page of the Court's website.

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 do they represent the official views of the Department of Justice.*

Trade Remedies

Court of International Trade Rejects Constitutional Challenge to Section 232 of Trade Expansion Act. *American Institute for International Steel v. United States* (Ct. Int'l Trade) [Kelly, J., Choe-Groves, J., Katzmann, J., *in dubitante*]. On March 25, 2019, a three-judge panel of the CIT rejected a challenge to the Presidential Proclamation imposing tariffs on steel articles pursuant to Section 232 of the Trade Expansion Act of 1962. Section 232 authorizes the President to restrict imports of articles that threaten to impair national security. Plaintiffs, importers of foreign steel, contended that, in light of

the flexibility afforded to the President to identify the appropriate remedy, the statute lacks an "intelligible principle," rendering it an unconstitutional delegation of Congress' authority to set duties and tariffs. In finding the statute to be constitutional, the court held that it was bound by *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), in which the Supreme Court held that Section 232 "easily fulfills" the "intelligible principle" test. In a separate *dubitante* opinion, Judge Katzmann agreed that the court was bound by *Algonquin*, but expressed doubt that the statute's delegation is constitutional.

District Court Dismisses Challenge to Presidential Tariff Decisions. *Barnes v. Trump* (E.D. Wisc.) [Pepper, J.]. On March 13, 2019, the United States District Court for the Eastern District of Wisconsin dismissed a *pro se* complaint challenging the President's imposition of various safeguard and national security tariffs. The court first concluded that the subject matter of the case fell within the exclusive jurisdiction of the CIT, which includes challenges to the administration and enforcement of any law involving the imposition of tariffs or duties. The court further concluded that transfer to CIT would be futile because Mr. Barnes lacked Article III standing, characterizing Mr. Barnes as "claiming that he has a right to bring this suit as a concerned citizen."

Antidumping/Countervailing Duties

Federal Circuit Sustains Anti-Dumping Duties on Freshwater Crawfish Tail Meat from China. *Weishan Hongda Aquatic Food, et al. v. United States* (Fed. Cir.) [Dyk, *Wallach*, Chen, JJ.] On March 5, 2019, the Court of Appeals for the Federal Circuit affirmed the CIT's judgment sustaining antidumping duties imposed by Commerce on freshwater crawfish tail meat imported from China. The Federal Circuit determined that the Chinese respondents could raise in litigation only those arguments they, or other interested parties, had first exhausted before Commerce in the earlier administrative proceedings. On the merits, the court rejected those exhausted arguments argued again on appeal, affirming the CIT in sustaining the antidumping duty rates assigned the Chinese respondents.

Federal Circuit Affirms Commerce's Authority to Depart from Trade Remedy Practice to Address New Harms Alleged By Domestic Solar Industry. *Canadian Solar v. United States* (Fed. Cir.) [Newman, *O'Malley*, Chen, JJ]. On March 12, 2019, the Federal Circuit affirmed the judgment of the CIT, which sustained Commerce's determination concerning the scope of antidumping and countervailing duty orders covering solar products from the People's Republic of China. The court held that Commerce acted reasonably and within its statutory authority when it departed from its usual country of origin test.

Federal Circuit Upholds Imposition of Antidumping and Countervailing Duties to Unassembled Curtain Walls Imported from China. *Shenyang Yuanda Aluminum Industry Engineering Co. v. United States* (Fed. Cir.) [Prost, *Taranto*, Newman, JJ.]. On March 18, 2019, the Federal Circuit sustained a Commerce decision holding that unassembled curtain walls are subject to the antidumping and countervailing duty orders on aluminum extrusions from China.

Federal Circuit Upholds Commerce's Denial of Home Market Commission Offset on Antidumping Duties for Large Power Transformers from Korea. *ABB, Inc. v. United States* (Fed. Cir.) [*Schall*, Moore, Stoll, JJ.]. On April 5, 2019, the Federal Circuit affirmed the CIT's decision sustaining Commerce's determination that it was not required to apply a home market commission offset in its calculation of antidumping duties on

large power transformers from Korea. In determining the dumping duty, Commerce makes various adjustments, including deducting any commissions paid on U.S. sales. Commerce applies a home market commission offset, which limits the deduction to the amount of commissions paid on foreign market sales, to sales where the commissions were incurred in the foreign market, but not to sales where the commissions were incurred in the United States. The foreign producer, Hyundai, argued that the denial of the offset for sales where the commissions were incurred in the United States was an unreasonable interpretation of 19 U.S.C. § 1677b(a)(6)(C)(iii), which provides for adjustments due to the "circumstances of sale" but does not state where commissions would need to be incurred to qualify for such an adjustment. The Federal Circuit held that Commerce's interpretation was reasonable because the statute does not speak to the precise question at issue and Commerce's position is supported by primary interpretive documents.

Federal Circuit Affirms Denial of Injunctive Relief for Imports of Solar Cells from China.
Sumecht NA, Inc. dba Sumec North Am. v. United States, et al. On May 8, 2019, the Federal Circuit affirmed the CIT's denial of injunctive relief for certain imports of solar cells from China. For most civil actions involving the antidumping or countervailing duty laws, there is a general statutory requirement that, at the outset of the litigation, interested parties must obtain an injunction preventing the final assessment of the duty liability on the imported merchandise because, once the final duty assessment has been made, the trial court will be foreclosed from rendering relief. The question presented here was whether this requirement is necessary for cases commenced under the trial court's so-called residual jurisdiction. The court of appeals held that the plaintiff importer could not establish irreparable harm to support its request for injunctive relief.

Federal Circuit Affirms Commerce Determinations In Antidumping Review Of Chinese Glycine Imports. *Evonik Rexim (Nanning) Pharmaceutical Co., v. United States* [Prost, C.J., Lourie, Hughes, J.J.] On June 11, 2019, the Federal Circuit affirmed Commerce's determination to assign a zero antidumping margin to a Chinese glycine producer/exporter. The court upheld Commerce's core determination that the Chinese producer's lone sale during the review period was *bona fide* and thus sufficient to review. The court also affirmed Commerce's decisions to offset the Chinese producer's costs with the value of byproducts produced in making glycine and to use certain other data in valuing the company's costs of production.

Court of International Trade Denies Mexican Tomato Growers' Application for a Temporary Restraining Order and Motion for a Preliminary Injunction.
Confederacion de Asociaciones Agricola del Estado de Sinaloa, A.C., et al., v. United States (Ct. Int'l Trade) [Choe-Groves, J.]. On June 6, 2019, the CIT denied an application for a temporary restraining order and motion for a preliminary injunction filed by plaintiffs, which are organizations representing approximately 750 growers and exporters of tomatoes from Mexico. In 1996, Commerce initiated an antidumping investigation to determine whether tomatoes from Mexico were being sold in the United States at less than fair value and issued an affirmative preliminary determination. Over the course of the next 23 years, the parties entered into a series of agreements suspending the investigation. Commerce withdrew from the suspension agreement in May, resumed the investigation, suspended liquidation, and began requiring importers to pay cash deposits or post a bond at the rates identified in the preliminary determination. Following Commerce's withdrawal from the agreement, the plaintiffs filed a complaint challenging Commerce's actions in resuming the investigation. The court held that that the plaintiffs were unlikely to succeed on the merits of their claim

because the antidumping statute required Commerce to resume the 1996 investigation. And the court held that the plaintiffs failed to establish that they would be irreparable harmed absent an injunction.

Customs

Court of International Trade Affirms Government's Rejection of Duty Drawback Claim as Untimely. *EchoStar Technologies L.L.C. v. United States* (Case No. 16-00074 (CIT) [Katzmann, J.]. On June 17, 2019, the CIT granted summary judgment for the government, finding that plaintiff failed to timely file complete duty drawback claims within the three-year statutory timeframe under 19 U.S.C. § 1313(r). Accordingly, plaintiff was not entitled to a refund of duties and fees paid on goods imported into the United States that plaintiff subsequently exported. The court rejected plaintiff's primary argument that submitting certain, *albeit* incomplete, information electronically within three-years satisfied the statutory requirement that a "complete claim" must be submitted within that timeframe. The court also rejected plaintiff's alternative claim that U.S. Customs and Border Protection (CBP) was responsible for the untimely filed claims because CBP's informal guidance on filing drawback claims was unclear and confusing.

Feature Articles

Country of Origin, NAFTA and Section 301 Duties:

When Origins Collide

by Jennifer Horvath*

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Recent U.S. Customs and Border Protection ("CBP" or "Customs") rulings showcase an unforeseen impact of the new China tariffs regarding goods imported from NAFTA countries. Essentially, an inherent contradiction can exist in these scenarios, where a good can have a country of origin of a North American Free Trade Agreement ("NAFTA") country under the NAFTA preferential rules but at the same time still be determined to have China origin under the non-preferential country of origin rules and thus be subject to the Section 301 China tariffs. Companies should closely review their country of origin determinations to ensure they fully understand their duty obligations, and in order to avoid unnecessary penalties and/or review potential mitigation strategies.

This article provides an overview of the non-preferential rules of origin, and the preferential rules of origin using the rules conferring NAFTA origin as an example. We then analyze the scenario where goods that are considered NAFTA originating can also be determined to have China as the country of origin, which implies additional tariff obligations.

As a general introduction, country of origin determination and proper marking are a key enforcement area for Customs. Importers are generally obligated to mark and declare the correct country of origin for every imported article under 19 U.S.C. § 1304, with some exceptions and exclusions. Further, 19 U.S.C. § 1484 obliges importers to exercise

reasonable care in importing, with § 1484(A)(1)(B) requiring importers to ensure information is declared to properly assess duties and ensure any other applicable legal requirements are met. This provision is especially applicable in the current trade environment where special duties are assessed based on the country of origin, such as under Section 232 aluminum and steel duties (19 U.S.C. § 1862, as amended) and China Section 301 tariffs (19 U.S.C. § 2411). False statements concerning origin can result in the assessment of penalties under 19 U.S.C. § 1592, with varying amount assessed based on the level of negligence or even fraud. Such errors can also result in liquidated damages, loss of special duty privileges, detention or exclusion of goods at the time of entry, or demand for redelivery of the products to CBP custody. Furthermore, if CBP finds the goods are not marked correctly under the country of origin marking statute, a marking duty of 10% of the goods value is automatically assessed. This marking duty is in addition to any other penalties and the above negative potential consequences. For many reasons, it thus behooves importers to take care in ascertaining the correct country of origin.

I. Non-Preferential

A. Entirely Grown, Produced or Manufactured

Non-preferential rules of origin follow the U.S. country of origin marking provisions under 19 C.F.R. Part 134. The simplest method of determining the country of origin is when the good is entirely the growth, product, or manufacture of one country, as defined in 19 C.F.R. § 134.1, which provides that "country of origin" is the country of manufacture, production, or growth of any article of foreign origin entering the U.S. However, the single country test is a difficult requirement to meet and does not often occur. If the product does not completely originate from one country as required above, then the country of origin for the imported product must be assessed under the substantial transformation test.

B. Substantial Transformation Test

If the origin cannot be determined by applying the wholly grown, produced or manufactured test, then the country of origin for Customs purposes is the country in which a substantial transformation takes place. A "substantial transformation" is a process that results in a new article having a different name, character, and use. *See* 19 C.F.R. § 134.35. For the requisite transformation to take place, a product must take on a new name, character, or use distinct from the materials that were used to produce the good.

The substantial transformation test is based on multiple factors, meaning that no one factor is dispositive in determining origin. Some main factors (among others) CBP will consider include: (1) the character, name, and use of the article and that of its individual parts; (2) the nature and complexity of the final article's manufacturing process, as compared to processes used to make the components and sub-assemblies; (3) whether the end-use was predetermined at time of entry; (4) the value added by the manufacturing process; and (5) whether the essential character is established by the manufacturing process or by the essential character of the imported parts or materials.

For the courts and CBP to find a change in character, there often must exist a substantial alteration in the characteristics of the article or components. Purely cosmetic changes are insufficient for a finding of substantial transformation. Additionally, a change in name alone is not a dispositive factor. The substantial transformation test contains nuances. Therefore, CBP analysis is administered on a case-by-case basis, often involving

subjective judgments as to what qualifies. Unlike many preferential rules of origin such as NAFTA, there is no bright line test.

A common misconception occurs where importers believe that if there is change in tariff classification from the components to the finished good, then a substantial transformation has occurred. This is not a concrete rule but can be indicative of a substantial transformation. However, even if a change in classification exists, the above factors must be reviewed as a whole to determine if a substantial transformation has taken place. CBP tends to focus on the change in use or character of the component materials after undergoing further processing and/or assembly into the final product.

As well, importers must exercise caution when considering whether assembly effectuates a substantial transformation. When assembly occurs post-importation, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change. *See* H300226 (September 13, 2018). In this regard, a consideration of the test is the extent of the assembly and whether the parts lose their identity and become an integral part of an entirely new article. For example, a simple assembly of goods that takes only a few minutes even though it may involve many complex parts, is not considered to effectuate the required transformation.

II. NAFTA Marking Rules of Origin

Preferential rules of origin are used to establish that products are eligible for special duty treatment, usually duty free. NAFTA is a key trade agreement for the U.S. that eliminates tariffs on most goods considered as originating from Canada, Mexico, and the United States under its specific rules.The NAFTA rules of marking/origin at 19 C.F.R. Part 102 generally utilize the tariff shift method to determine the NAFTA country of origin for goods that are not wholly obtained from a member country.

Section 102.11 provides a required hierarchy for determining the country of origin of a good for marking purposes. The regulations state that, for NAFTA marking and origin determination purposes, the country of origin of a good is the country in which:

(1) the good was wholly obtained or produced; or
(2) the good was produced exclusively with domestic materials; or,
(3) each of the foreign materials satisfies the applicable tariff shift set forth in 19 C.F.R. § 102.20.

If none of the above apply, there are other methods by which the NAFTA country of origin may be determined. For example, the NAFTA origin may be determined based on the material that imparts the essential character of the good. If a set, mixture or composite good is involved, each material may be reviewed and given equal consideration. Finally, If the origin of a good cannot be determined using any of the above rules, the country of origin of the good is the last NAFTA country in which the good underwent production other than a simple assembly or minor processing. Minor processing includes cleaning, including removal of rust, grease, paint, or other coatings. *See* 19 C.F.R. § 102.10. Simple assembly is defined as the fitting together of five or fewer parts all of which are foreign (excluding fasteners) by bolting, gluing, soldering, sewing, or by other means without more than minor processing.

It is important to note here (without complicating the issue too much) that the NAFTA rules of origin for qualification purposes under 19 C.F.R. § 181 should also be reviewed in order to claim NAFTA preferential treatment for an imported good upon entry into the U.S. The specific rules to determine if a good is also originating under NAFTA are found

in General Note 12 of the Harmonized Tariff Schedule of the United States ("HTSUS").

III. Unexpected Applicability of China 301 Tariffs

Companies that import NAFTA products should be aware of the potential for Section 301 China tariff applicability, even though the imported good may be of NAFTA origin. This potential incongruity arises due to the different tests required under general country of origin requirements per Part 134, and the NAFTA rules of origin under Part 102. Even though both rules illustrate similar principles, they do not always produce the same result because the NAFTA marking rules are objective while the non-preferential substantial transformation test is more subjective. As well, the NAFTA marking rules at § 102.0 have a limited application only for marking purposes, as Part 102 only applies for marking, along with determining the duty rate and staging for apparel and textile goods. Thus, Part 134 must also be considered when determining country of origin for potential applicability of trade protective measures such as Section 301 duties.

CBP ruling H300226 (September 13, 2018) highlights this conflicting outcome, which involves the country of origin determination of electric motors. The motor was assembled in Mexico with three Chinese origin parts. CBP found that the motor was a product of Mexico for marking purposes under the NAFTA marking rules (19 C.F.R. Part 102), but also determined that the finished motor had China as the country of origin under the substantial transformation test (19 C.F.R. Part 134). Even though the product qualified under the NAFTA, it was still subject to China Section 301 duties. CBP stated that "when considering a product that may be subject to antidumping, countervailing, or other safeguard measures, the substantial transformation analysis is applied to determine the country of origin." CBP reviewed and determined that the name, character, and use of the product was not altered to qualify as a substantial transformation; instead, the process was a simple assembly. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." Here, the use of the motor parts had a pre-determined end use before import, and the production process was a mere simple assembly. Therefore, a substantial transformation did not occur. A similar case was decided shortly thereafter in Ruling N301392 (November 15, 2018).

The key takeaway is that in reviewing for Section 301 tariff applicability, the substantial transformation test must be reviewed regardless of whether the imports originate from a NAFTA partner country. Companies should be aware that just because their goods qualify under NAFTA, this does not mean they are automatically going to be duty free. Companies can mitigate this potential issue by monitoring and strategizing their production and assembly operations in Mexico or Canada to ensure that the final product meets the factors required under the substantial transformation test when Chinese origin inputs are used.

WTO Panel Sets Limitation on National Security Exception

by Miles Simposon*

**Miles Simpson is an attorney working at the United States Trade Representative and has interned with the Department of Commerce, the US Court for International Trade, and the International Trade Commission.*

This article summarizes the background, findings, and implications of the WTO's recent

decision: *Russia - Measures Concerning Traffic in Transit*, WT/DS512/R, circulated April 5, 2019.

I. Background:

Ukraine started the WTO dispute in 2016 in response to Russian bans and restrictions of traffic in transit by road and rail from Ukraine across Russia to Kazakhstan and Kyrgyzstan. Ukraine argued that these measures were inconsistent with WTO obligations related to freedom of transit in Article V and the requirement to public trade regulations in Article X of GATT 1994.

Russia invoked the national security exception under Article XXI(b)(iii) of the GATT 1994, arguing that the measures were necessary to protect its essential security interests resulting from an international emergency that occurred in 2014. Furthermore, Russia argued that the WTO Panel does not have jurisdiction over the dispute because the national security exception should be considered "totally self-judging" by the country claiming the exception.

II. Findings

The WTO Panel's analysis began with the examination of Russia's arguments under the national security exception of Article XXI of the GATT 1994. The Panel found that " [t]here is no basis for treating the invocation of Article XXI [...] as an incantation that shields a challenged measure from all scrutiny[,]" rejecting Russia's argument that national security exception is "self-judging."

The Panel then assessed whether Russia's measures were taken "in time of war or other emergency in international relations" within the meaning of Article XXI. Russia pointed to the aforementioned international emergency in 2014. The Panel found that it was not relevant which actor or actors bear international responsibility for the existence of this situation. Based on the evidence given by Ukraine in the form of United Nations General Assembly resolutions, the Panel concluded that the situation between Ukraine and Russia since 2014 constituted an emergency in international relations and that each of the measures challenged by Ukraine was taken during the time of that particular emergency.

Next, the Panel determined whether Russia's measures also complied with the requirement in the introductory clause/chapeau of Article XXI(b). The Panel decided that the phrase "which it considers necessary" in the chapeau must be interpreted as meaning that it is entirely up to the Member imposing the measure and invoking the exception to determine such necessity. The Panel stated that the Member's obligation is to adhere to the obligation of good faith. They considered that "this obligation is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e., that they are

not implausible as measures protective of these interests." Based on this assessment, the Panel found that it was up to Russia to determine the necessity of its measures, as there was sufficient plausibility that the measures were linked to the emergency in international relations.

Even though Russia's measures were covered by Article XXI(b)(iii) of the GATT 1994, the Panel nonetheless proceeded with an analysis of the substantive claims of violation. It did so because in the event that its findings on Russia's invocation of Article XXI(b)(iii) are reversed in an appeal, "it may be necessary for the Appellate Body to complete the analysis." This statement is unusual because the Panel simultaneously admitted that it is not the Panel's place to decide on issues that are not absolutely necessary to dispose of the particular dispute.

III. Implications

These findings will have strong implications for disputes regarding the U.S. tariffs on steel and aluminum made pursuant to Section 232. Like Russia did the in the Ukraine case, the United States has invoked the national security exception under Article XXI of the GATT 1994.

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